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No. 90-

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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ALUMINUM COMPANY OF AMERICA,
Petitioner,
v.
JAMES E. ALM,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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July 3, 1990

QUESTIONS PRESENTED

1. Whether an award of punitive damages imposed by a jury without any meaningful standards and in an amount wholly within its absolute discretion comports with the Due Process Clause of the Fourteenth Amendment.

2. Whether, in a state that supposedly regulates awards of punitive damages by means of judicial appeals, it violates the fair hearing principle of the Due Process Clause for a state's highest court to sustain an award by applying a theory of punitive liability different from and more burdensome than that under which both the trial and the lower court appeals proceeded.

3. Whether it violates the *ex post facto* principle of the Due Process Clause for a state supreme court, in the course of policing discretionary jury awards of punitive damages, to lower the threshold for imposing punitive damages and to apply this new standard retroactively to conduct that was governed, at the time it took place, by a standard more generous to defendants.

PARTIES TO THE PROCEEDING

The Aluminum Company of America has no parent company. Its nonwholly owned subsidiaries are listed below:

Aluminum Company of America – Parent Company

Adela Investment Company S.A.

Alcoa Brazil Holdings Company

Alcoa Aluminio S.A.

Alcoa Aluminio do Nordeste S.A.

Imobiliaria Vargem Dos Bois S/C Ltda.

Alcoa Mineracao S.A.

Mineracao Ceu Estrelado Limitada

Alcoa Seguradora S.A.

Alumar Administracao De Bens S.A.

Alumar Administracao Industrial S.A.

Alumar Consortium (Joint Venture)

Alusud Engenharia, Montagens E Servicos Ltda.

Imobiliarai Vargam Dos Bois S/C Ltda.

Companhia De Linha III (Inactive)

Companhia Geral De Minas

Alcoa Construcoes E Servicos S/C Ltda.

Companhia Da Linha III (Inactive)

Companhia Maranhense de Metals (Inactive)

Ilha De Sao Luis Limitada

Companhia Maranhense de Metals (Inactive)

Exacto-Fundicao De Aluminio Ltda.

Forest Nordeste S.A. Fabrica De Condutores

Electricos

Imobiliaria Vargem Dos Bois S/C Ltda.

Harmonia Corretora De Seguros S.A.

Harmony Trading & Services Company

Ilha De Sao Luis Limitada

Laminacao Pocos De Caldas Ltda.

Tendtodo Materials Para Construcacao Ltda.

Alcoa International Holdings Company (Common Stock)

Alcoa Asia Limited

Alcoa France S.A.R.L. (Inactive)

Alcoa Inter-America, Inc.

Alcoa International Canada, Ltd.

Alcoa International Finance Company

Alcoa International, Inc.

Alcoa Espana S.A. (Inactive)

Alcoa International (Asia) Limited

Alcoa Italia S.p.A.

Alcoa S.A.

Alcoa Japan Limited

Alcoa Nederland Holding B.V.

Alcoa Extruded Products (UK) Limited

B.W.P. (Architectural) Limited

Alcoa Nederland Investment B.V.

Alcoa Nederland B.V.

Alumet Etten B.V.

Burgerhout B.V.

Intal B.V.

Sypla System Planning B.V.

Extrusion De Aluminio S.A. (Extrudal)

Alcoa of Australia Limited

A.F.P. Pty. Limited

Hedges Gold Pty. Ltd.

Alcoa of Australia (Asia) Limited

Coala Insurance Company Limited

Portland Aluminum Smelter (Joint Venture)

Portland Smelter Services Pty. Ltd.

Norsk Alcoa A/S%

A/S Skibsinvestering

Norsk Alcoa A/S

Elkem Aluminum (Partnership)

Alcoa Kasei Limited

MRCP Limited

Jamalco (Joint Venture)

Societe de Ceramiques Techniques S.A.

Westin Hotel (Partnership)

Alcoa Fujikura Ltd.

Arneses Y Accesorios De Mexico, S.A. de C.V.

Engineered Plastic Components, Inc.

Manufacturea De Components Electricas De Mexico,
S.A. de C.V.

United States Alumoweld Company

Alcoa Coastal Chemicals (Partnership)

Alcotec Wire Company (Partnership)

Arctek Corporation

B & C Research, Inc.

Forges de Bologne S.A.

Metro Recovery Systems (Partnership)

ML Systems Corporation

Pimalco, Inc.

Induction Billet Corporation

Pimalco Seamless, Inc.

Corporate Insurance and Reinsurance Company
Limited%

Delta Holdings, Inc.

Delta America Re Insurance Company

Hopewell International Insurance Ltd.

Lancer Financial Group

Delaney Management Company, Inc.

Lancer Insurance Company

Lancer Syndicate

Tortuga Casualty Company

United Insurance Company

Biotage, Inc.

Capsulas Metalicas S.A.

Complejo Industrial Pedernales, S.A. (in process of
liquidation)

Corporation for Innovation Development
 Fyne Management Systems Ltd.
 Greater Lebanon Hotel Enterprises, Inc.
 Grupo Aluminio, S.A. de C.V.
 Almexa, S.A. de C.V.
 Almexa Aluminio, S.A. de C.V.
 Alumex, S.A. de C.V.
 Nacional De Estructuras Ligeras Para El
 Transporte, S.A. de C.V.
 Aluminio, S.A. de C.V.
 Inmobiliaria Aluminio, S.A. de C.V.
 Diversified Metals International Corporations
 Halco (Mining) Inc.
 Boke Service Company, U.S.A.
 Boke Trading, Inc.
 Compagnie Des Bauxites De Guinee
 Inversions Alcoa, S.A.
 Inversiones Araco Compania Anonima
 Inversiones Rialpe S.A.
 Moralco Limited
 Sepracor, Inc.
 Shibazaki Seisakusho Limited
 Shibazaki Metal Print Co., Ltd.
 Squaw Creek Coal Company (Joint Venture)
 n.v. hotelmaatschappij "TORARICA"
 Suralco-Billiton Joint Venture#1
 Suralco-Billiton Joint Venture#2
 Swanal Limited
 TKM Limited
 Yadkin, Inc.

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OPINIONS BELOW

The decision of the Texas Supreme Court is reported at 785 S.W.2d 137 and reprinted as Appendix A. The opinion of the Court of Appeals of Texas, Houston (14th Dist.) is reported at 753 S.W.2d 478 and reprinted as Appendix B. The earlier opinion of the Texas Supreme Court is reported at 717 S.W.2d 588 and reprinted as Appendix C. The earlier opinion of the Court of Appeals of Texas, Houston (14th Dist.) is reported at 687 S.W.2d 374 and reprinted as Appendix D. The opinion of the District Court, Harris County, disregarding the jury's answers on products liability and punitive damages, and entering judgment on the finding of negligence, is unreported and reprinted as Appendix E.

JURISDICTION

The decision of the Texas Supreme Court reinstating the jury's award of punitive damages was entered on January 31, 1990. A timely petition for rehearing was denied on April 4, 1990. See Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case presents important issues concerning the due process limits on the award of punitive damages and their review in state court systems, issues that complement questions this Court has already deemed worthy of plenary consideration in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala.1989), *cert. granted*, 110 S.Ct. 1780 (1990) (No. 89-1279). This case is therefore a suitable companion case to *Pacific Mutual*, or at the very least should be held pending resolution of that case.

On June 3, 1976, plaintiff James E. Alm suffered a serious injury to his right eye when the aluminum twist-off cap on a glass bottle of "7-Up" soft drink blew off under the pressure of carbonation because it had been improperly threaded and affixed. Appendix at 16 ("A16"). Alm sued the grocery store where he had bought the bottle; J.F.W. Enterprises, Inc. ("J.F.W."), the local "7-Up" bottler that was licensed by the Seven-Up Company to bottle and sell its soft drinks and that had affixed the cap to the bottle; and the Aluminum Company of America ("Alcoa"), which had sold the capping equipment to J.F.W. but had not manufactured the cap in question. The grocery store and J.F.W. settled before trial. (A33).

It is undisputed that, at the time of the conduct in issue, Texas law provided that:

Gross negligence, to be the ground for exemplary damages, should be that *entire want of care* which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons affected by it.

Burk Royalty Co. v. Walls, 616 S.W.2d 911, 917 (Tex. 1981) (original emphasis). *See also id.* at 920 (reiterating this test).

"In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care." *Id.* at 922. Accordingly, the question for a jury asked to award punitive damages was "whether, *in light of all the surrounding circumstances*, the defendant failed to exercise care" *Id.* at 921 (emphasis added).

The *Burk Royalty* Court had also explained that, in assessing a jury's finding of gross negligence, "the reviewing court must look to *all of the surrounding facts, circumstances, and conditions*, not just individual elements or facts." *Id.* at 922 (emphasis added). The Texas Supreme Court repeatedly stressed the standard of an "entire want of care," *see id.* at 916, 917, 919, 920, 922, and the requirement of considering "all surrounding facts and circumstances," *see id.* at 919, 921, 922.¹

Thus it was well established under Texas law at the time of the incident that triggered this case, and at the time of trial as well, that punitive damages could be recovered *only* if the defendant, based on *all* facts and circumstances, exhibited an entire want of care toward the plaintiff.

At trial the battle over negligence turned on plaintiff's failure-to-warn theory: whether Alcoa had been negligent in failing to warn Alm, and/or the 7-Up bottler, J.F.W., of the risk of bottle cap blow-off. Alcoa took the position that it had no duty to warn Alm — the ultimate consumer — given that its role was limited to selling J.F.W. machines that J.F.W. then used to manufacture a product that was eventually purchased by

¹ See also *Burk Royalty*, 616 S.W.2d at 926 (Greenhill, C.J., concurring) ("The bottom line, as I read the cases, is the state of mind of the defendant. Did he or she act with callous or conscious indifference to the safety of others? To do that, I suggest that the reviewing court must look at all the facts. In a large number of our cases, the Court has *not* disregarded all of the acts of the defendant. It has considered the bad and the notbad elements of the defendant's behavior in reaching the legal conclusion that there is evidence to support the jury's verdict, or not.") (original emphasis).

Alm. Alcoa argued that because twist-off bottle caps are safe if properly applied, it had acted reasonably in concentrating on generally warning soft drink companies, and their bottlers, of the dangers of personal injury posed by improper bottlecap application. These efforts included a 1970 manual and brochure that was mailed to all bottlers (A16, A70), wall charts illustrating improper cap application, a 1972 slide-show presentation (shown to the Seven-Up Company and many other soft drink companies) that graphically illustrated the dangers of blow-off (A25, A30-31), and various other written communications. (A25-26, A31).

There was no dispute that the Seven-Up Company had exclusive control over the labeling of 7-Up bottles and therefore sole authority to place warnings on them (A26, A30), nor any dispute that Seven-Up corporate officials had received all these warnings. (A25-27, A30-31). Alcoa also demonstrated that J.F.W. had received at least the 1970 manual containing a warning about the risk of blow-off. (A16, A70).

The jury nevertheless found Alcoa negligent and the trial court entered judgment for \$163,025 in actual damages. Alm also sought and was awarded \$1 million in punitive damages.²

² The liability question for the jury inquired:

Was Alcoa grossly negligent with respect to the closure system and was such gross negligence a proximate cause of the occurrence in question?

By the term "grossly negligent" as used in this Question, is meant that *entire want of care* which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it.

Charge of the Court, Question No. 11 (emphasis added). The jury answered "Yes". (A79). The damages question read:

What sum of money, if any, do you find from a preponderance of the evidence that Jim Alm should be awarded against Alcoa as exemplary damages?

In answering this Question, you are instructed that "exemplary damages" means *an amount which you may in your discretion*

The trial court deemed this punitive award “against the great weight and overwhelming preponderance of the evidence” (A81) and set it aside.

The court of appeals reversed and remanded for a new trial, finding that the evidence even as to ordinary negligence was insufficient to support the verdict. *Alm I* (Ct.App.) (A59). The court left undisturbed the trial court ruling setting aside the award of punitive damages.

Appeal was then taken by plaintiff Alm to the Texas Supreme Court, which remanded on the failure-to-warn issue, directing the court of appeals to justify its view of the evidence more thoroughly and, in particular, to consider Alcoa’s arguments as to factual insufficiency on the issue of ordinary negligence. *Alm I* (Tex.S.Ct.) (A32). The Texas Supreme Court further ruled that the trial court had erred in disregarding the jury’s determination of liability for punitive damages; since the jury’s answer, even if “against the great weight and overwhelming preponderance of the evidence” (A42), had more than a scintilla of support in the record, the trial court should have ordered a new trial on the issue of gross negligence rather than simply disregarding the jury’s findings. (A42-43). The Texas Supreme Court therefore remanded to the court of appeals to give Alcoa an opportunity to contest the sufficiency of the evidence on the issue of gross negligence and to allow the lower court to determine whether the punitive award was so against the great weight of the evidence that a new trial should indeed be held. (A43).

On remand, *Alm II* (Ct.App.), the court of appeals upheld the award of compensatory damages, on a failure-to-warn theory, as factually sufficient. Turning to the award of punitive

award as an example to others and as a penalty or by way of punishment, in addition to any amount that may have been found by you as actual damages.

Charge of the Court, Question No. 12 (emphasis added). (A80).

damages, the court of appeals noted that the Texas Supreme Court's remand left the lower court with all its traditional jurisdiction on this issue:

Specifically, the mandate calls for this court to consider *any point* Alcoa may choose to raise in respect to the jury's finding of gross negligence and exemplary damages.

(A19) (emphasis added).³ Applying the recognized *Burk Royalty* standard of review, the court of appeals "consider[ed] and weigh[ed] all the evidence, both in support of and contrary to the challenged finding." (A22). Among that evidence was Alcoa's broad effort to alert the entire industry and Seven-Up in particular. The court of appeals ultimately agreed with the trial judge that the evidence supporting an award of punitive damages was "so weak or . . . so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust". (A22-23).⁴

³ Alcoa argued, *inter alia*, that the award of punitive damages violated the Due Process Clause, relying upon dicta in this Court's opinion in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986), and upon the Court's decision to note probable jurisdiction to review the same due process issue in *Bankers Life & Casualty Co. v. Crenshaw*, 107 S.Ct. 1367 (1987) (No. 85-1765). Alcoa's Brief On Remand at 27-28. Since the Texas Court of Appeals remanded for a new trial on punitive damages, it had no occasion to reach the constitutional issue. That situation changed only when the Texas Supreme Court surprised everyone by holding that liability for punitive damages could be found in this case, retroactively, as a matter of law without a new trial.

⁴ The court emphasized the undisputed fact that Seven-Up alone controlled labeling of the bottles and therefore that only Seven-Up could affix a warning label to the bottles to inform consumers such as Alm. Indeed, on appeal Alm argued that "Seven-Up controlled the warning labels and that Alcoa could not satisfy its duty to warn the ultimate consumers by warning J.F.W. because Alcoa had a duty to warn Seven-Up." *Alm II* (Tex.S.Ct.) (Gonzalez, J., dissenting) (A8). The court of appeals concluded that Alcoa's evidence "indicated Seven-Up was adequately trained . . . and warned about, as well as familiar with, the propensities of the product and capable of passing on a warning" (A27), and in particular the court found that "officials of Seven-Up and other bottling companies had viewed the slide show, which began with an explicit warning of the hazard involved and continued with a technical pinpointing of the problem." (A27-28). (See also A30-31 (Sears, J., concurring and dissenting)).

The Court of Appeals ruled that, even if consideration of the lack of direct warnings to the public or to J.F.W. might, in isolation, support an award of punitive damages, when “[a]ll of the evidence” was considered, no callous indifference or gross negligence could be found because it was beyond cavil that “Alcoa was making an effort to deal with and extinguish the problem by alerting Seven-Up.” (A27) (emphasis added). Especially because “the evidence on the issue of gross negligence was not well developed in light of the Supreme Court’s new rule” imposing a duty to warn the general public through an intermediary, the court of appeals thought it only fair to remand for a new trial on the issue of punitive damages, for “it would be manifestly unjust to find the evidence factually sufficient to uphold them here.” (A26).

On appeal once more, *Alm II* (Tex.S.Ct.), the Texas Supreme Court conclusively reinstated the punitive damages award in a bitterly divided 5-to-4 decision. It did *not* do so on the theory that the court of appeals had improperly weighed the various kinds of evidence on the issue, for that avenue is blocked by art. V, § 6 of the Texas Constitution, which makes decisions of the courts of appeals conclusive on all questions of fact.⁵ Nor did Texas’ highest court adhere to the preexisting rule that entitled Alcoa to a new trial on the issue of gross negligence. Instead, in a decision that “circumvent[ed] the court of appeals decision” ordering a new trial,⁶ a narrow majority of the Texas Supreme Court held, *as a matter of law* — that is, as a matter of the substantive standard for assessing punitive damages — that all the evidence elicited in Alcoa’s favor showing vigorous efforts to warn the industry of the dangers of blow-offs was *flatly irrelevant*. (A7). It ruled that only warnings to the intermediary through which a chattel flows (here, J.F.W.), or directly to the ultimate consumer, are

⁵ See *Alm II* (Tex. S. Ct.) (Gonzalez, J., dissenting) (A12).

⁶ *Id.* (A12).

relevant to the issue of gross negligence and punitive damages. Warnings to the Seven-Up Company, which was concededly the *only* party in a position to affix a warning label on the bottle, simply would not be considered. (A7). Because of this change in the rules for punitive liability, there was now “no evidence in the record to negate the jury’s finding of gross negligence,” and the court reinstated the award of punitive damages as a final judgment. (A7).

Four dissenting Justices recorded their dismay:

I am astounded that the court has concluded as a matter of law that Seven-Up was not an appropriate intermediary through which Alcoa could have discharged its duty to warn ultimate consumers. I am absolutely flabbergasted that the court has effectively held that under these facts Alcoa was *grossly negligent* as a matter of law. To the best of my knowledge, this is the first time in the history of American jurisprudence that a court has held that a jury *could not disbelieve* a plaintiff’s case as to gross negligence when the issue is disputed, and that a court should determine this issue as a matter of law. The possible consequences of this unprecedented holding boggle the mind.

(A7-8) (Gonzalez, J., joined by Phillips, C.J., and Cook and Hecht, JJ., dissenting) (original emphasis).

After today, the court, not the jury, is empowered to determine, *on the basis of plaintiff’s proof alone*, whether the defendant’s mental attitude is sufficiently “bad” to justify punitive as well as actual damages. In *any* case short of a confessed judgment, such a holding would be profoundly disturbing. But

in this case, where there clearly is some evidence that Alcoa attempted to warn of the dangerous propensities of the closure system, a holding of *an entire want of care* as a matter of law is an absolute travesty.

(A12-13) (emphasis added). Under the majority's newly imposed theories, the dissent would have remanded for a new trial to consider the evidence relevant to, and the defenses available against, the imposition of punitive damages. (A12).⁷

Thus, Alcoa is now liable for an award of punitive damages that: (1) is undeniably predicated on the retroactive application of a legal standard for punishment harsher than that which was in force at the time of the conduct in question; and (2) was upheld by the Texas Supreme Court only by abandoning the preexisting theory of liability applied by the jury (which rendered an unsupportable verdict), and shifting to a novel theory of liability applied for the first time on this appeal.

REASONS FOR GRANTING THE WRIT

1. This case, like *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279, *cert. granted*, April 2, 1990, presents the question whether the Due Process Clause of the Fourteenth Amendment imposes limits on a jury's standardless discretion to assess punitive damages in civil cases. Therefore, at the very least,

⁷ The dissenters also noted the unconstitutional arbitrariness and unpredictability that the majority's shift in standards would build into Texas' regime for imposing and policing awards of exemplary damages:

Henceforth, whenever five members of this court are displeased with a particular result, they can impose any result they desire merely by holding that a party proved the necessary facts conclusively, i.e., as a matter of law. This result runs roughshod over . . . our concept of fairness to all parties.

(A13).

this petition should be held for disposition pending the resolution of *Pacific Mutual*, at which point the Court can, as appropriate, issue the writ and remand for reconsideration or deny the petition. Yet in several respects this case constitutes a superior vehicle for resolving the due process issues raised by unguided punitive damage awards that are of obvious concern to this Court and of great importance to the nation's state and federal judicial systems.

First, this case undoubtedly involves an award of punitive damages, unlike *Pacific Mutual* where the form of the general verdict makes it impossible to know whether the award is entirely compensatory or partially punitive in nature.

Second, in this case there has been no legislative change in the Texas rules governing imposition of and computation of punitive damages. The regime under which petitioner has suffered continues in force, unlike *Pacific Mutual* where the Alabama tort regime at issue has been amended by the state legislature, thereby threatening to diminish the relevance of whatever decision the Court hands down in that case.

Third, in contrast to the Alabama regime, which at least details factors that the trial court and appellate court must consider in specifically addressing and reviewing a jury's award of exemplary damages, the Texas tort system at issue here provides no guidance for either the jury or the reviewing courts as to which aggravating and mitigating factors or other considerations should be addressed and weighed when awarding punitive damages.

In these respects, this case is superior to *Pacific Mutual* as a vehicle for addressing the important due process issues already under review by this Court. Therefore, petitioner urges the Court to grant the writ and to hear this case after *Pacific Mutual* during its 1990 Term.

2. Although the Constitution does not require the states to furnish litigants with an appeals process, "if a State has created

appellate courts as an 'integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process [Clause]." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). With respect to judicial regulation of exemplary damages, requiring a court to "look longer and harder at an award of punitive damages based on . . . skeletal guidance," *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2923 (1989) (Brennan and Marshall, JJ., concurring), does not furnish due process of law if the appellate court is itself free to abandon the liability and evidentiary rules applied by the jury and lower courts and to sustain an award on an altogether new and different theory of liability. Establishing a regime in which state appellate courts police jury awards accomplishes little if those courts do not police themselves.

That is the situation presented here. This case was tried to the jury on the theory that, "'in determining whether a defendant is liable for gross negligence, the question is whether, in light of all the surrounding circumstances, the defendant failed to exercise care'" *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 921 (Tex. 1981) (emphasis added). The same standard was applied by the Texas Court of Appeals (*Alm II*):

In determining whether there is some evidence to support the jury's finding of gross negligence, the reviewing court must look at *all of the surrounding facts, circumstances, and conditions, not just individual elements or facts*, which tend to show a state of mind amounting to conscious indifference.

(A19) (citing *Burk Royalty*) (emphasis added). In accord with this standard, the court of appeals unanimously reversed the jury's determination of gross negligence because it deemed the

"evidence . . . so weak [and] the finding . . . so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." (A22-23). In particular, the court of appeals held that "the evidence greatly preponderates that Alcoa kept Seven-Up informed of th[e] hazard" (A25), and noted that the parties "appear to agree that the parent soft drink company, Seven-Up, controlled the graphics and art work on the bottles . . . and, therefore, neither Alcoa, J.F.W., or anyone else, other than Seven-Up, could control what appeared on the bottles," including the warning (or lack thereof) on which this case turned. (A26).

It is beyond cavil that the Texas Constitution makes that determination of insufficient evidence binding upon the Texas Supreme Court. Tex.Const. art. V, § 6; *Alm II* (Tex. S. Ct.) (Gonzalez, J., dissenting) (A12). Yet the Texas Supreme Court reversed the court of appeals and sustained the jury's finding of gross negligence by the simple expedient of holding that the overwhelming evidence of Alcoa's warnings to Seven-Up was irrelevant as a matter of law, based upon the court's ruling that only the bottler, J.F.W., and not Seven-Up, was an appropriate intermediary capable of warning the public of potential danger. (A46). With all of defendant's exculpatory evidence magically and suddenly excluded from judicial consideration, the court had little difficulty in upholding the jury's award of punitive damages. (A7).

The Texas Supreme Court thus abandoned the standard under which the case was tried and appealed — "consider and weigh *all the evidence*, both in support of and contrary to the challenged finding" (A22) (emphasis added) — and applied a *new* standard precluding *any* consideration of defendant's evidence that it warned what it believed to be the appropriate party. Rather than weighing "all the evidence," the court "effectively held that under these facts Alcoa was grossly negligent as a matter of law." (A8) (Gonzalez, J., dissenting) (original emphasis).

The Texas Supreme Court's decision to sustain the jury's finding of gross negligence and its award of punitive damages by applying a different standard of liability than that on which the case was tried violates the Due Process Clause. *Cole v. Arkansas*, 333 U.S. 196 (1948), displays striking parallels to this case. The petitioners in *Cole* urged in the state supreme court that the evidence was insufficient to support the judgment against them. *Id.* at 201. The Arkansas court sidestepped that argument and affirmed the convictions on a theory of criminal liability different from that under which the trial and appeal had proceeded. *Id.* at 202. This Court unanimously reversed, holding that, "[t]o conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.* See also *Dunn v. United States*, 442 U.S. 100, 106-07 (1979) ("appellate courts are not free to revise the basis" on which a judgment was sought and procured "simply because the same result would likely obtain on retrial"); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978).

Similarly, in *United States v. Parrilla Bonilla*, 648 F.2d 1373 (1st Cir. 1981), a conviction was reversed when, on appeal, the government changed its theory of liability after realizing that the evidence it had put on at trial was "concededly insufficient to support the convictions below on the theory on which they were obtained." *Id.* at 1385-86 (relying on *Cole* and its progeny). Just as the government was not free in either *Cole* or *Parrilla Bonilla* to adapt its theory of liability after trial to retrofit the relevant evidence, so neither the respondent nor the Texas Supreme Court was free in this case to adapt its theories of relevant evidence and of liability to justify, retroactively, the desired result.

The fact that *Cole* was a criminal rather than a civil decision does nothing to diminish its relevance to this case. The principle

animating *Cole* is derived not from the Fourth, Fifth, Sixth or Eighth Amendment guarantees that govern the rights of criminal defendants, but from the Due Process Clause of the Fourteenth Amendment, which safeguards the rights of *all* defendants, civil or criminal. *Cole* and its progeny are based on a "broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of" life, liberty, or property "without notice and a meaningful opportunity to defend." *Jackson*, 443 U.S. at 314. That principle applies whenever the state wields its judicial power to stigmatize and punish adjudicated wrongdoers, be the penalty a jail term, a criminal fine, or an order to pay punitive damages.

If a state chooses to regulate the imposition of punitive damages by means of appeals to its higher courts, "fundamental principles of procedural fairness," *Presnell*, 439 U.S. at 16, require that those tribunals affirm or reverse awards of exemplary damages on the basis of the same standard of liability that was employed in the proceedings below, without resort to new legal theories. Any due process requirement that this Court may establish in *Pacific Mutual* as to the substantive standards for awarding punitive damages would prove to be a hollow promise indeed, like a munificent bequest in a pauper's will, if state appellate courts remained free to uphold an erroneous application of those liability standards by simply changing the standard of review on appeal.

3. Entirely independent of the argument above that the standard for imposing punitive damages was changed between trial and final appeal in violation of *Cole v. Arkansas*, the standard was also changed between the time the allegedly tortious conduct occurred and the time the defendant was ultimately held to account for it in the Texas courts. Retroactive application of this new liability standard to defendant Alcoa violates the *ex post facto* principle of the Due Process Clause.

It is undisputed that, at the time Alcoa's conduct occurred, the admonition to a manufacturer such as petitioner was that it had better take steps to act responsibly, for if later, "in light of all the surrounding circumstances," the defendant were deemed to have acted with an "entire want of care," it would be liable for exemplary damages. *Burk Royalty*, 616 S.W.2d at 921-22. But under the new standard promulgated by the Texas Supreme Court in this case, it is not enough that a defendant make good faith efforts to warn an intermediary and to act responsibly in light of all the circumstances, for no longer do *all* of the circumstances count. A manufacturer cannot avoid punitive damages by warning the only intermediate party with the power to control the labels on the ultimate product and therefore to pass any warning on to the ultimate consumer. It turns out that warnings must be given to the actual manufacturer of the product, in this case the bottler, J.F.W., even if that party has no power to warn the consumer; all other evidence is now irrelevant and the defendant who adduces only such "extraneous" evidence is subject to punitive damages *as a matter of law*.

This dramatic transformation in the law was wholly unforeseeable — indeed, it borders on the irrational to exonerate a defendant from punitive liability only if it warns a party that admittedly lacks the ability to pass that warning on to the consumer, whose safety, after all, is supposedly the ultimate concern of Texas tort law. Even if Texas were free to adopt such a peculiar and self-defeating rule to govern all future conduct, it cannot apply the rule to petitioner Alcoa *ex post facto* to expand its risk of punitive liability.

The principle upon which the *Ex Post Facto* Clause is based — "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191 (1977). Consequently, the

right not to have the rules on which you will be judged and punished changed after you have acted is not limited to legislative action, but is “protected against judicial action by the Due Process Clause” of the Fourteenth Amendment. *Id.* at 192. From the very beginning, the *Ex Post Facto* Clause has been understood to proscribe “[e]very law that alters the *legal* rules of *evidence*, and receives less, or different testimony than the law required at the time of the commission of the offense.” *Collins v. Youngblood*, 58 U.S.L.W. 4855, 4856 (U.S. June 21, 1990) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)) (original emphasis).⁸

Consider *United States v. Hall*, 26 F.Cas. 84 (D. Pa. 1809) (No. 15,285), *aff’d*, 10 U.S. (6 Cranch) 171 (1810), an early case recently reaffirmed by this Court, which offers sound guidance for this case. “In *Hall*, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo to Portland. As a legal excuse, the defendant argued that a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo.” *Youngblood*, 58 U.S.L.W. at 4858. “[U]nder the existing law at that time, it was sufficient for the defendant to prove prevention, by *any* peril of the sea, happening to vessel or cargo; but under the [subsequently enacted] enforcing law, he must prove a loss of the vessel” *Hall*, 26 F.Cas. at 87 (emphasis added). Justice Washington concluded that application of this new standard to defendant Hall “would deprive Hall of a defense of his actions available at the time he sold the cargo, and thus be an invalid *ex post facto* law.” *Youngblood*, 58 U.S.L.W. at 4858. This Court confirmed that the *Hall* analysis remains good law. *Id.*

⁸ See also *Hopt v. Utah*, 110 U.S. 574, 590 (1884) (retroactive procedural changes permissible so long as they “leav[e] untouched the nature of the crime and the amount or degree of proof essential to conviction”), *cited in Youngblood*, 58 U.S.L.W. at 4857 n.3.

This case presents an analogous situation. At the time of the acts in question, Texas law allowed Alcoa the defense that it should be spared punitive damages because it had not, in light of all the evidence, displayed an *entire* want of care — thereby admitting and weighing evidence of Alcoa's warnings to Seven-Up. Yet the new rule formulated and retroactively applied by the Texas Supreme Court forbids consideration of such evidence and requires the defendant to prove that it warned a particular intermediate party, the bottler J.F.W., which was in any event admittedly incapable of passing warnings along to consumers.⁹

It matters not that the change in liability standards or available defenses was wrought here by judicial rather than legislative action, for it is well settled that “an unforeseeable judicial enlargement” of a standard for imposing punishment, “applied retroactively, operates precisely like an *ex post facto* law, such as Art.I, § 10, of the Constitution forbids.” *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

⁹ The shift in the law here also tracks the retroactive application held unconstitutional in *Marks v. United States*. There, the standard for determining whether material was obscene and therefore warranted punishment shifted from an “utter[]” lack of any redeeming social value to a less stringent requirement of a lack of “serious” value. 430 U.S. at 196 n.11. Here, the standard for finding gross negligence and imposing exemplary damages on defendant was watered down from an *entire want of care* in light of *all* the circumstances of its warnings to *all* intermediaries, to a far less forgiving focus on lack of care as judged solely by the nature of warnings given to a particular intermediary that was itself concededly without power to put a warning label on the bottle for the benefit of ultimate consumers.

Id. at 353-54; *Marks v. United States*, 430 U.S. at 192 (quoting *Bouie*).

The decision of the Texas Supreme Court below “did not simply clarify” previous Texas law on liability for gross negligence, “it marked a significant departure,” *id.* at 194, from the standard established in *Burk Royalty* and other cases. It is beyond peradventure that such a dramatic reinterpretation of the law in fact took place; indeed, it bitterly divided the Justices of Texas’ highest court. See *Alm II* (A6-7) (majority opinion); (A7-8) (Gonzalez, J., joined by Phillips, C.J., and Cook and Hecht, JJ., dissenting). Because of this change in the evidence that will be deemed relevant to the issue of petitioner’s punitive liability, what was previously merely negligent conduct has suddenly become gross negligence. This retroactive change in the law “aggravates” petitioner’s alleged negligent act, “makes it greater than it was when committed.” *Bouie*, 378 U.S. at 353 (emphasis in original, quotation marks omitted). As Chief Justice Marshall put it, such a shift in the governing rules of conduct impermissibly “renders an act punishable in a manner in which it was not punishable when it was committed.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

The situation here parallels *Bouie v. City of Columbia* in significant respects. The defendants there contended, in the alternative, either that there was insufficient evidence under the law to support the judgment against them, or that the judgment was supportable on the evidence adduced only because the governing law had been reinterpreted after the fact — in which case they had been denied due process. *Bouie*, 378 U.S. at 349-50, 357. This Court held there was a violation of the Due Process Clause, *id.*, and it should grant certiorari and do likewise here, where it is undenied (and undeniable) that, before the Texas Supreme Court revised the rules, the jury’s finding that petitioner was grossly negligent was “so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust.” *Alm II* (Ct. App.) (A22-23).

Although most of the cases applying the Due Process Clause's *ex post facto* principle may have been decided in the context of criminal statutes, they are nonetheless apposite here because this case likewise involves the use of the state's judicial apparatus to impose *punishment* — here, punitive damages. The *Ex Post Facto* Clause itself has not been strictly confined to *criminal* punishments,¹⁰ and the parallel principle contained in the Due Process Clause certainly has not been so limited. That “basic due process concept” forbids even retroactive application of an “unforeseeable and unsupported state-court decision” to foreclose this Court's review of a federal question. *Bouie*, 378 U.S. at 354. *A fortiori*, that principle surely bans retroactive changes in substantive liability for judicially assessed punitive damages, for in each case “‘a federal right’” — due process of law — “‘turns upon the status of state law as of a given moment in the past — or, more exactly, the appearance to the [defendant] of the status of state law as of that moment’” *Id.*¹¹

It is no answer to say that the defendant here was adequately forewarned not to be grossly negligent by the mere knowledge that Texas has long provided for exemplary damages in some circumstances. To be sure, defendant was on notice that Texas makes companies liable for their negligence and that Texas juries enjoy unbridled discretion in setting the amount of punitive damages. *But precisely because the jury's power is so sweeping, its reach has always been confined within the limits*

¹⁰ See, e.g., *United States v. Hall*, 26 F.Cas. at 86 (*Ex Post Facto* Clause applies to suit by government for forfeiture of a contractual embargo bond, similar to a bill of lading, and bars the United States from retroactively changing the defenses available to the contracting vessel owner), discussed and approved in *Youngblood*, 58 U.S.L.W. at 4858.

¹¹ Even a retroactive alteration in *nonpunitive* civil legislation “may offend due process if it is ‘particularly harsh and oppressive,’” *Pension Benefit Guaranty Corp. v. Gray*, 467 U.S. 717, 733 (1984). Accordingly, a change in the judicial interpretation of a civil law will not be retroactively applied if it could “produce substantial inequitable results” or “injustice or hardship.” *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971).

*announced and applied by Texas' appellate courts.*¹² Prior to the opinion below, Texas held defendants liable for punitive damages only if consideration of all the circumstances and evidence revealed an entire want of care; when the acts in question took place, petitioner Alcoa had no warning that it could be deemed grossly negligent and severely punished under a new standard that arbitrarily excluded all evidence of its undeniably bona fide efforts to warn what both the law and common sense indicated was the appropriate intermediate party. Petitioner was surprised in the most literal and unfair sense of the word.

If the result wrought by the court below “‘were attained by an exercise of the state’s legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious,’ and ‘The violation is none the less clear when that result is accomplished by the state judiciary’” *Bouie*, 378 U.S. at 355. Individuals and business entities may not be left to guess about retroactive application of future expansions or changes in the standards for determining and punishing gross negligence. “‘No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.’” *Id.* at 351. This principle is particularly important in the context of the standards of liability for — as opposed to the computation of awards of — punitive damages, and it is more directly implicated in this case than it is in *Pacific Mutual*. Therefore, a writ of certiorari should be granted.

¹² *Cf. Marks v. United States*, 430 U.S. at 195 (“the [obscenity] statute involved here always has used sweeping language to describe that which is forbidden. But precisely because the statute is sweeping, its reach necessarily has been confined within the constitutional limits announced by this Court.”).

CONCLUSION

Petitioner respectfully submits that the issues presented here plainly merit this Court's plenary consideration. Due process limitations on the size of awards of punitive damages are already under review by the Court in *Pacific Mutual*, and this case, because it involves punitive damages awarded and upheld in "proceedings lacking the basic elements of fundamental fairness," *Browning-Ferris*, 109 S.Ct. at 2921, presents an opportunity to focus not just on the size of the awards themselves but, perhaps more importantly, on "the method by which they are imposed," *id.* at 2924 (O'Connor, J., joined by Stevens, J., concurring). Indeed, guidance from this Court on constitutionally acceptable procedures for imposing punitive damages, when compared to guidance on whether and how the amounts of such awards may be deemed sufficiently proportionate, would be less likely to burden the Court with the need to review a host of fact-bound punitive judgments in the future.

Moreover, the imposition and affirmance of exemplary damages in this case on the basis of retroactive application of a new standard for punitive liability presents due process questions that this Court has already recognized as "important issues which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986) (adverting to "retrospective imposition of punitive damages under a new cause of action"); *see also Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1655 (1988) (O'Connor, J., joined by Scalia, J., concurring) (adverting to due process issues raised when a state supreme court "changed its standard for judging when an insurer may be liable for punitive damages and applied the new standard retroactively to this case.").

Accordingly, petitioner urges this Court to issue a writ of certiorari and set this case for argument, or at the very least to hold the case pending the resolution of *Pacific Mutual*.

Respectfully submitted,

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July 3, 1990



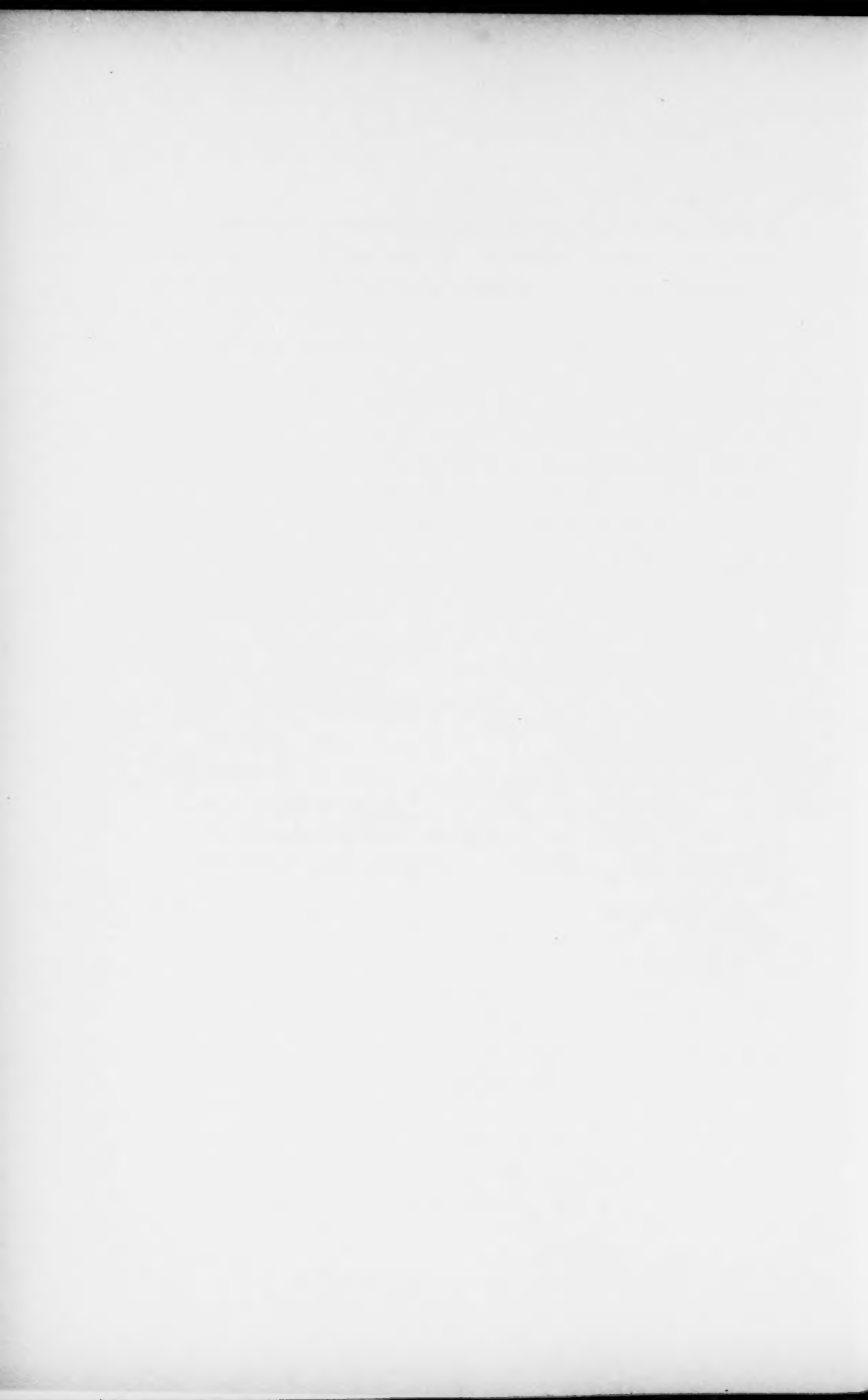


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A1

APPENDIX A

**ALUMINUM COMPANY OF
AMERICA, Petitioner,**

v.

James E. ALM, Respondent.

No. C-7889.

Supreme Court of Texas.

Jan. 31, 1990.

Rehearing Overruled April 4, 1990.

MAUZY, Justice.

This personal injury case arose when, in 1976, a threaded, twist-type bottle cap blew off a Seven-Up soft drink bottle and struck James Alm in the eye, severely injuring him. Alm brought suit against the Aluminum Company of America (Alcoa), JFW Enterprises, Inc., and Lewis & Coker Supermarket.¹ At the close of trial, the jury found that Alcoa was grossly negligent and that its negligence was a proximate cause of Alm's injuries. The trial court rendered judgment on the verdict in favor of Alm for his actual damages but disregarded the jury's answers on gross negligence and therefore refused to award the exemplary damages. The court of appeals then reversed and remanded the cause to the trial court, holding that the evidence of Alcoa's negligence was factually insufficient and that Alcoa had no duty to warn Alm of possible bottle cap blow-off. 687 S.W.2d 374.

¹ Alm settled with Lewis & Coker and JFW before trial.

In our first consideration of this cause, we held that Alcoa's role as a designer and manufacturer of the processing equipment gave rise to a duty to warn the ultimate consumer about the possibility of cap blow-off, which duty could be satisfied by proving that Alcoa's intermediary, JFW, "was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning." 717 S.W.2d 588, 592 (*Alm I*). We remanded the cause to the court of appeals for consideration of Alcoa's factual insufficiency point regarding the inadequacy of its warning to JFW. Additionally, we reinstated the jury's finding of gross negligence and remanded to the court of appeals for its consideration of any points raised by Alcoa concerning that issue.

On remand, the court of appeals held that the jury's finding on the inadequacy of Alcoa's warning to JFW was based on factually sufficient evidence. It further determined, however, that the evidence was factually insufficient to support the jury's finding on gross negligence and remanded the issue of gross negligence to the trial court. 753 S.W.2d 478. We now reverse.

I

Two issues are presented: (1) whether the court of appeals erred by remanding the gross negligence issue, and (2) whether the court of appeals erred by not remanding the ordinary negligence issue.

Alcoa makes two arguments in support of its contention that the court of appeals erred by not remanding the entire cause to the trial court. Alcoa asserts first that it was not given an opportunity to introduce evidence of its warning to the Seven-Up Corporation in light of the "new" legal duty placed on it by this court in *Alm I*. Alcoa argues second that the issue of ordinary negligence must be remanded because the court of appeals refused to review the evidence of its warning to Seven-Up.

To put Alcoa's arguments in the proper perspective, it is necessary to understand the relationship of the entities involved. The undisputed evidence shows that during the 1960's, Alcoa designed, patented, manufactured, and marketed a closure system for applying aluminum caps to carbonated soft drink bottles. The closure system included a capping machine which applied threaded, pilfer-proof caps. Under a franchise agreement, Seven-Up licensed JFW to bottle its product. In 1969 Alcoa sold such a capping machine to JFW for use by Houston 7-Up Bottling Company, an unincorporated division of JFW. JFW purchased the aluminum capping material from W.H. Hutchinson & Son, Inc., which manufactured the pilfer-proof caps under licensing agreements with Alcoa. JFW sold the bottled soft drink to Lewis & Coker Supermarket, which sold a bottle to Alm.

As noted above, we held in *Alm I* that Alcoa had a duty to warn the ultimate consumer, Alm, but that Alcoa could satisfy this duty by proving that its intermediary, JFW, was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning to the ultimate consumer. Alcoa contends that because of this "new" duty it was prevented from offering evidence to the jury on this issue.

Assuming *arguendo* that our holding in *Alm I* did place a new duty on Alcoa, its claim that it was not allowed to introduce evidence of its warnings to Seven-Up is not supported by the record. At trial, Alcoa offered evidence of training sessions it gave to Seven-Up on the proper application of the aluminum caps and the danger of cap blow-off. The evidence consisted of office correspondence between Alcoa and representatives of Seven-Up which contained references to slide show presentations and training seminars on the proper operation of the Alcoa closure system. Alm objected to the admission of the evidence, arguing it was irrelevant. Alcoa argued, however, that because Alm sought exemplary damages, the evidence was

material for the purpose of showing the efforts it made to provide information and training on the proper use of its closure system.

The trial court sustained Alm's objection to the general offer but allowed the administration of the evidence as a limited offer. See Tex.R.Civ.P. 105. However, since Alm did not request a limiting instruction, admission of the evidence was, for all practical purposes, a general offer. See Tex.R.Civ.P. 105(a); *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987); *Scotchcraft Bldg. Materials, Inc. v. Parker*, 618 S.W.2d 835, 837 (Tex.Civ.App.—Houston [1st Dist.] 1981, writ, ref'd n.r.e.). Therefore, the jury was afforded the opportunity to consider the evidence of Alcoa's warnings to Seven-Up in its deliberation on ordinary negligence.

II

Alcoa's second argument is that the court of appeals erred by not considering the evidence of its warning to Seven-Up in connection with the ordinary negligence issue.

The question is thus posed whether Seven-Up was an appropriate intermediary through which Alcoa could have fulfilled its duty to warn the ultimate consumer. We noted in *Alm I* that a manufacturer, as well as a supplier, of a product has a duty to inform users of hazards associated with the use of its products. The Restatement (2d) of Torts § 388² describes the

² Restatement (2d) of Torts § 388 (1965) reads: One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

manufacturer's duty to warn the ultimate user of its product, while comment n to § 388 states that this duty may be discharged by an adequate warning to the intermediary through whom the chattel is supplied. The pertinent part of comment n reads:

In all such cases the question may arise as to whether the person supplying the chattel is exercising that reasonable care, which he owes to those who are to use it, by informing *the third person through whom the chattel is supplied* of its actual character.

Giving to the third person through whom the chattel is supplied all information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it.

Restatement (2d) of Torts § 388 comment n (1965) (emphasis added).

Alcoa designed, patented, manufactured and marketed the closure system which it sold to JFW. JFW purchased the capping machine directly from Alcoa and the capping materials from a company manufacturing them under an Alcoa license. Seven-Up was never in the chain of distribution and merely licensed JFW to bottle its product. At no time did Seven-Up exercise control over the instrumentality which caused the injury, i.e., the closure system.

Given these circumstances, Seven-Up could not be "the third person through whom the chattel is supplied" within the meaning of comment n. We conclude, therefore, that Seven-Up

was not, as a matter of law, an appropriate intermediary through which Alcoa could have discharged its duty to warn the ultimate consumer, Alm.

III

We turn our attention finally to the issue of gross negligence. He argues the evidence shows conclusively that Alcoa was consciously indifferent about the possibility of bottle cap blow-off. We agree.

Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of conscious indifference to the right or welfare of the person or persons to be affected by it. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981).

What lifts *ordinary* negligence into *gross* negligence justifies the penal nature of the imposition of exemplary damages. The plaintiff must show that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care. Such conduct can be active or passive in nature.

Id. at 922 (emphasis in original).

Alcoa's own witnesses testified that it had actual knowledge about the danger of serious injury resulting from "weak threads" produced by bottlers using the Alcoa closure system as early as 1967, when the first suit was filed against Alcoa for a personal injury which had resulted from cap blow-off. Alcoa's witnesses also testified that by 1975, thirty-four such lawsuits had been filed against Alcoa. However, as this Court noted in *Alm I*,

[t]he record shows that the only "warning" given JFW of the hazards associated with bottle cap blow off came in an Alcoa owner's manual distributed [in 1970] with its capping machine. The statement in that manual read: "Leakage or closure blow off at lower pressures can occur when the closure application is improper or the glassware is not within specification." The statement did not warn that serious personal injuries could result from cap blow off. The language was not designated as a warning, and it was not set off in type different from that used throughout the manual.

717 S.W.2d at 593. The undisputed evidence shows that at the time of Alm's injury in 1976, Alcoa was acutely aware of the danger of cap blow off, but there is no evidence that it did anything to warn JFW or the purchasers of JFW's products about the very real nature of this danger. In short, there is no evidence in the record to negate the jury's finding of gross negligence. We hold, therefore, that the court of appeals erred in remanding the gross negligence issue.

Accordingly, the judgment of the court of appeals is reversed and the judgment of the trial court modified so as to reinstate the exemplary damages awarded in the jury's verdict and, as modified, is affirmed.

GONZALEZ, J., files a dissenting opinion in which PHILLIPS, C.J., and COOK and HECHT, JJ., join.

GONZALEZ, Justice, dissenting.

I am astounded that the court has concluded as a matter of law that Seven-Up was not an appropriate intermediary through which Alcoa could have discharged its duty to warn ultimate consumers. I am absolutely flabbergasted that the court has

effectively held that under these facts Alcoa was *grossly negligent* as a matter of law. To the best of my knowledge, this is the first time in the history of American jurisprudence that a court has held that a jury *could not disbelieve* a plaintiff's case as to gross negligence when the issue is disputed, and that a court should determine this issue as a matter of law. The possible consequences of this unprecedented holding boggle the mind. I would remand this cause ("*Alm II*") to the trial court for a new trial on the issues of both negligence and gross negligence.

Facts

James Alm suffered a severe eye injury when an aluminum bottle cap exploded off of a Seven-Up bottle. Alm had purchased the bottle from a Lewis & Coker supermarket, which in turn had purchased the soft drink from a bottler, JFW Enterprises. Aluminum Company of America ("*Alcoa*") designed and manufactured the equipment that was used to cap the carbonated soft drink bottle. JFW bottled the beverage for Seven-Up under a franchise agreement. Under its trademark rights and franchise agreement, *Seven-Up controlled the labeling and any cautionary language on the bottle and cap*. Alcoa had absolutely no control over the contents of the bottle or any aspect of the soft drink package which reached Alm.

Alm sued Lewis & Coker, JFW, and Alcoa under theories of strict liability, breach of warranty, and negligence. He settled with Lewis & Coker and JFW and entered into a Mary Carter agreement with JFW. The case proceeded to trial on Alm's allegations that Alcoa was liable because it did not warn Alm of the dangers of explosive cap separation. Alm asserted at trial and on appeal that Seven-Up controlled the warning labels and that Alcoa could not satisfy its duty to warn the ultimate consumers by warning JFW because Alcoa had a duty to warn Seven-Up. Yet, when Alcoa presented evidence of this

warning to Seven-Up, Alm objected that this testimony was irrelevant and self-serving. The trial court sustained the objection, but the evidence was admitted for other purposes.

The jury found against Alcoa on all submitted liability issues. The trial court disregarded the answers to special issues on strict liability, stating that strict liability did not apply to Alcoa. The court of appeals reversed the judgment, holding that the evidence of negligence was factually insufficient and that Alcoa had no duty to warn consumers. 687 S.W.2d 374. Alm brought forward only the negligence portion of the case for appeal.

Alm I

In *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 591-92 (Tex.1986) ("*Alm I*"), we held that Alcoa had a duty to warn the ultimate consumer of the dangers associated with bottle caps manufactured with a closure system which it designed, built, and sold. We further held that this duty to warn could be discharged by warning an intermediate user of the closure system if there were reasonable assurances that the warning would reach the ultimate consumer.¹ *Id.* The court today seeks to avoid remanding the negligence portion of this case by asserting that Seven-Up "was not, as a matter of law, an appropriate intermediary through which Alcoa could have discharged its duty to warn the ultimate consumer." *Alm II*, at 140. Arguably, under these facts, Seven-Up was a proper intermediary to warn, given our decision in *Alm I*.

¹ As Alcoa did not manufacture the injury-causing instrumentality — the bottle cap — the duty to warn that we imposed upon Alcoa was unprecedented. Prior to *Alm I*, there had never been a Texas case in which a duty to warn was imposed on a manufacturer that did not produce the injury-causing instrumentality. Thus, in *Alm I*, we announced a new rule for the jurisprudence of this state governing tort liability. See also *Costilla v. Aluminum Co. of America*, 826 F.2d 1444, 1448 (5th Cir.1987), vacated in part and remanded, 835 F.2d 578 (1988); Note, *Alm v. Aluminum Co. of America: An Extension of Duty to Warn*, 39 Baylor L.Rev. 339, 344-47 (1987).

Furthermore, we did not hold in *Alm I*, as the court today deceptively and erroneously maintains, that Alcoa's duty to warn the ultimate consumer could be satisfied by proof that "Alcoa's intermediary, JFW, 'was adequately trained and warned.'" *Alm II*, at 138 (emphasis added). Instead, we held that Alcoa could satisfy its duty to warn by proving "that *its* intermediary was adequately trained and warned." *Alm I*, 717 S.W.2d at 592 (emphasis added). We never mentioned JFW by name, nor does anything in the opinion suggest that it was the only appropriate intermediary. The court today in *Alm II* rewrites our opinion in *Alm I* to reach its desired result.

Under its franchise agreement with JFW, Seven-Up controlled the labeling on both the bottle and its cap. Accordingly, Seven-Up arguably was in the best position to warn the ultimate consumer of the danger of a bottle cap explosion. As such, Seven-Up should not be ruled out as a proper intermediary through which Alcoa could discharge its duty to warn. In fact, the passage from comment n to the Restatement (Second) of Torts § 388 (1965) cited by the court supports the conclusion that Seven-Up should not be excluded as a proper intermediary:

In all such cases the question may arise as to whether the person supplying the chattel is exercising that reasonable care, which he owes to those who are to use it, by informing the third person through whom the chattel is supplied of its actual character.

Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. *The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it.*

(Emphasis added). The purpose of the rule announced in *Alm I* is to insure that the ultimate consumer receive any warnings necessary to make the product in question safe, while recognizing the inherent difficulty of transmitting such warnings when the manufacturer is not in the direct chain of production.

Negligence

In the instant case, Alcoa could logically argue that an appropriate method of supplying the requisite information with reasonable assurance that it would reach the ultimate consumer was by communicating it to Seven-Up, which had control over the labeling of the bottle caps and bottles. The injury causing instrumentality was the bottle cap — not the closure system. The mere fact that JFW had control over the closure system did not give it the ability to transmit any warnings to Alm. The court's reliance on the phrase "through whom the chattel is supplied" in comment n to the Restatement (Second) of Torts § 388 is misplaced in light of the language of the comment as a whole, as well as common sense.

At the trial of *Alm I*, Alcoa, unaware of our impending change of the law, did not obtain an instruction informing the jury that Alcoa's duty to Alm could have been satisfied or discharged through a warning given to an intermediary. In light of the change in the law, an instruction of this nature should be given in order to insure a fair trial. See *Costilla v. Aluminum Co. of America*, 835 F.2d 578, 580 (5th Cir.1988) (holding that adoption of new rule in *Alm I* necessitated a remand for new trial). In the interest of justice, I would remand the negligence portion of this case for a new trial under the law as changed by *Alm I*. See *L.M.B. Corp. v. Gurecky*, 501 S.W.2d 300, 303 (Tex.1973) (remanding the cause to the trial court for a new trial in the interest of justice following a change in the law).

Gross Negligence

Furthermore, the gross negligence issue should be remanded for a new trial as well. The court of appeals made a determination that is constitutionally binding on this court by finding the evidence factually insufficient to support gross negligence. Tex. Const. Ann. art. V, § 6 (as amended in 1891); *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988); *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986). To circumvent the court of appeals decision, the court has taken the unprecedented step of finding gross negligence as a matter of law, thus denying Alcoa the right to a trial by jury on this the most basic of fact questions. As this court judiciously held in *Burk Royalty Co. v. Walls*, the leading case on gross negligence:

What lifts *ordinary* negligence into *gross* negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. The plaintiff must show that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care.

616 S.W.2d 911, 920 (Tex. 1981) (emphasis in original); see also *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, 573 (Tex. 1985) (conscious indifference denotes a decision to not care about the consequences of an act which may ultimately lead to harm).

After today, the court, not the jury, is empowered to determine, on the basis of plaintiff's proof alone, whether the defendant's mental attitude is sufficiently "bad" to justify punitive as well as actual damages. In *any* case short of a confessed judgment, such a holding would be profoundly disturbing. But

in this case, where there clearly is some evidence that Alcoa attempted to warn of the dangerous propensities of the closure system, a holding of an entire want of care as a matter of law is an absolute travesty. Alcoa had a program for bottlers meant to demonstrate the hazards associated with misapplied caps and cap blowoff which included wall charts, slide shows, and other information from technical personnel. How can it be said that Alcoa "didn't care" as a matter of law in the face of such evidence?

Henceforth, whenever five members of this court are displeased with a particular result, they can impose any result they desire, merely by holding that a party proved the necessary facts conclusively, i.e., as a matter of law. This result runs roughshod over the constitutional limitations on our jurisdiction and our concept of fairness to all parties.

For these reasons, I dissent.

PHILLIPS, C.J., and COOK and HECHT, JJ., join this opinion.

APPENDIX B

James E. ALM, Appellant,

v.

**ALUMINUM COMPANY OF AMERICA,
et al., Appellees.**

No. C14-82-00045-CV.

Court of Appeals of Texas,
Houston (14th Dist.).

June 23, 1988.

Rehearing Denied June 23, 1988.

Before JUNELL, MURPHY and SEARS, JJ.

OPINION ON MOTION FOR REHEARING

MURPHY, Justice.

On motion for rehearing we withdraw our Opinion dated April 28, 1988, and substitute the following.

This case is before us on remand from the Supreme Court of Texas. *Alm v. Aluminum Co. of America*, 717 S.W.2d 588 (Tex.1986), on appeal from our original opinion at 687 S.W.2d 374 (Tex.App.1985). The mandate calls for us to consider:

1) Alcoa's factual insufficiency points regarding the adequacy of its warning of the hazard of cap blow off to Alm and/or JFW;

2) Alcoa's factual insufficiency points regarding its failure to include a mechanical inspection system and its designing the cap with a pilfer-proof band by weighing all of the evidence; and

3) any points Alcoa may choose to raise in respect to the jury's finding of gross negligence and exemplary damages.

In our original opinion, we held Alcoa owed a duty to give an adequate warning to the bottler, J.F.W., about the risk that an improperly applied cap could blow off and cause personal injury. 687 S.W.2d at 381. Furthermore, we mistakenly reasoned that Alcoa had made such adequate warning to J.F.W. 717 S.W.2d at 592. We further held Alcoa's duty to give an adequate warning, however, did not extend to the ultimate consumer. *Alm*, 687 S.W.2d at 382. On Motion for Rehearing in our court, Alm vigorously asserted that Alcoa's duty to warn extended not to J.F.W., the bottler, but to 7-Up, the parent soft drink corporation because 7-Up has control over the beverage labels. 687 S.W.2d at 383. Now, the supreme court has held Alcoa had a duty to warn Alm, the ultimate user of the product, but could satisfy its duty by proving that its intermediary, J.F.W., was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning. 717 S.W.2d at 592. Thus, the supreme court has fashioned a new rule. See *Leonard v. Aluminum Company of America*, 800 F.2d 523 (5th Cir.1986), and *Cos-tilla v. Aluminum Company of America*, 826 F.2d 1444 (5th Cir.1987).

The salient issue when applying this new rule is whether Alcoa, as the original designer/manufacturer of the capping machine, had a reasonable assurance that its warning would reach those who might be endangered by the use of its product. 717 S.W.2d at 591. This means that if the warning to the intermediary was inadequate or misleading, or Alcoa's reliance on its intermediary was unreasonable due to incapacity, then Alcoa remains liable for injuries sustained by the ultimate user.

In the trial court the issue of negligence was broadly submitted, resulting in the jury's failure to make an explicit finding on the adequacy of Alcoa's warning. However, the jury did

find that Alcoa and J.F.W. proximately caused the occurrence resulting in Alm's injuries. From this, the supreme court reasoned that out of the four allegations Alm pleaded and attempted to prove concerning Alcoa's negligent conduct, the jury must have found at least one as true in order to find Alcoa's negligence proximately caused Alm's injuries. Accordingly, one of Alm's allegations was that Alcoa's warning to J.F.W. was inadequate. After reviewing the evidence, the supreme court concluded there was some evidence that Alcoa inadequately warned its intermediary and that this court must decide if the evidence was insufficient to support the verdict or if the verdict was so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re King's Estate*, 150 Tex. 663, 666, 244 S.W.2d 660 (1951).

It is undisputed that Alm's injuries were the result of a bottle cap blow-off caused by the improper threading of an aluminum cap which had been applied to a bottle of Seven Up. The closure system utilized on the particular bottle which caused Alm's injuries had been designed and manufactured by Alcoa. J.F.W., the bottler, had purchased that closure system from Alcoa and used it for servicing Seven Up, the parent soft drink company.

Alcoa provided an Owner's Manual with its capping machine, which was dated 1970 and provided the statement: "[l]eakage or closure blow-off at lower pressures can occur when closure application is improper. . . ." This appears from the evidence to be the only "warning" Alcoa gave J.F.W. concerning the hazards associated with bottle cap blow off until 1977 when Alcoa issued a manual containing a more explicit statement, reading: "On occasion, an improperly applied closure can be violently ejected by pressure in a package. This can cause serious injury to handlers or consumers." However, through a study conducted by one of Alcoa's employees as early as 1970, and as a result of an increasing number of law-

suits arising out of injuries associated with bottle cap blow-offs beginning in 1967, Alcoa had reason to believe that blow-offs of misapplied bottle caps could cause serious injury to the consumer many years prior to Alm's injury which occurred on June 3, 1976.

Alcoa asserts that specific measures were taken for training and instructing J.F.W. personnel by Alcoa's technical service representatives on various occasions from 1970 through 1976. However, as pointed out in the supreme court's opinion at 717 S.W.2d at 593, no proof was offered at trial showing that J.F.W. ever received any of the information allegedly made available to them in the form of instructions on bottle cap blow-off, slide presentations showing the hazards of it and wall charts distinguishing proper from improper cap application. Moreover, Mr. Charles Ferro, plant superintendent for J.F.W. since mid 1975, testified that, in fact, he was unfamiliar with the hazards of bottle cap blow off and he had seen neither the slide presentation nor the poster that Alcoa alleged it distributed to J.F.W.

Here, Alcoa argues that Ferro's assertion of not only /Alcoa's failure to warn him, but also of his unfamiliarity with the hazards of misapplied caps, is not believable. Mr. Ferro testified to having been involved in the bottling business for thirty-one years. He stated that he has worked for Royal Crown and Gulf Coast Bottling Company of Houston and San Antonio Bottling, all connected with carbonated beverages. Consequently, Ferro was aware that J.F.W. was packaging a product with carbonation and pressure in it, and that packages filled with a carbonated beverage can explode on line during the processing system. However, we fail to see why, if Ferro, as J.F.W.'s plant superintendent, had a practical background with bottling and packaging carbonated beverages, this should relieve or discharge Alcoa's duty to warn. Alcoa was responsible for designing and manufacturing the capping machine and was

familiar enough from prior incidents of cap blow-offs to commission a study completed in 1970 with the express intent of establishing "what factors of closure design, composition and application, taken separately, are most influential in the blow-off performance of the cap."

By the mandate directed to this court, we are charged to consider Alcoa's insufficiency points regarding the adequacy of its warning to J.F.W. It appears from the record that the only "warning" Alcoa gave J.F.W. was the statement contained in the manual earlier referred to. It is clear from a reading of the statement that no mention is made of the serious nature of personal injuries which can result from a bottle cap blow off. It is significant that leakage and closure blow-off are presented together in the statement suggesting that closure blow off need not be regarded as more serious than leakage; whereas, as has already been developed, closure blow-off can cause serious injury and leakage can cause a flat soft drink. Moreover, it is probably arguable that the statement could have served as directions in the manual, as opposed to constituting a warning. Yet, the distinction between the statement serving as a warning or as directions is important, as many courts have held that each serves separate purposes. *Bituminous Casualty Corp. v. Black and Decker Mfg. Co.*, 518 S.W.2d 868, 873 (Tex.Civ.-App.—Dallas 1974, writ ref'd n.r.e.). Ultimately, it appears that the wording is such that its distinct purpose is not readily apparent. However, it is clear that Alcoa had a *duty* to present a clear cautionary statement setting forth the exact nature of the danger involved. *Id.* at 873. Consequently, it was not against the great weight and preponderance of the evidence for the jury to find that the statement included in the owner's manual distributed by Alcoa did not adequately warn J.F.W. concerning the hazard of bottle cap blow-off.

Since we have found the evidence that Alcoa failed to adequately warn J.F.W. sufficient to support the jury verdict,

we do not find it necessary to reconsider Alcoa's other factual insufficiency points. Those points concerning Alm's allegations of negligence based on Alcoa's failure to include an automatic inspection system and Alcoa's negligent design of the pilfer-proof ring, are now considered for their bearing on the previously disregarded issues of gross negligence and exemplary damages.

We consider that the mandate of the Supreme Court precludes this court from considering Seven-Up as an appropriate intermediary in regard to ordinary negligence. The mandate, however, contains no such restriction concerning the issue of gross negligence. Specifically, the mandate calls for this court to consider any point Alcoa may choose to raise in respect to the jury's finding of gross negligence and exemplary damages. Alcoa has raised both legal and factual sufficiency grounds. Although the Supreme Court reinstated the jury's issues on gross negligence following the trial court's error in disregarding them, we do not consider the Supreme Court has passed upon the legal sufficiency of those issue by their reinstatement. Accordingly, we now address the legal sufficiency of the evidence regarding gross negligence.

In determining whether there is some evidence to support the jury's finding of gross negligence, the reviewing court must look at all of the surrounding facts, circumstances, and conditions, not just individual elements or facts, which tend to show a state of mind amounting to conscious indifference. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex.1981). Furthermore, we are mindful we must consider all evidence in a light most favorable to the jury verdict and we must indulge every reasonable inference deducible from the evidence in favor of the verdict. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965).

Initially, we begin by examining the evidence favorable to the jury's findings of gross negligence as it applies to Alcoa's

failure to warn. The evidence here was that Alcoa had actual knowledge about the hazards of "weak threads" being produced by bottlers using the Alcoa closure system as early as 1967, when the first suit was filed against Alcoa for a personal injury which had resulted therefrom. Mr. Jaye D. Gibbs, who testified at trial as an expert for Alcoa, wrote a report in 1970, in his capacity as an Alcoa employee, that contained the findings of a study he had conducted on the Alcoa closure system. This study found that "[f]aulty performance can cause serious injury to a would-be consumer if the closure blows off. . . ." Gibbs testified he considered the weak threads to be the most serious problem with the closure system back in 1970. Moreover, Mr. George Overturf, Manager of Closure Technology, testified Alcoa has always known that if a cap is improperly applied it can blow off and injure someone.

Overturf also demonstrated a lack of genuine concern over the steadily rising number of lawsuits filed against Alcoa. Whereas, in 1967 one lawsuit was filed, resulting in a frequency rate of .77 lawsuits per billion closure produced, by 1975 thirty four suits had been filed, with a frequency rate of 6.54 lawsuits per billion closures produced. The number of claims for the eight year period totaled at least 127. Furthermore, Overturf affirmed his awareness of a report entitled "Hazard Analysis: Bottles for Carbonated Soft Drinks—April 1975" from the U.S. Consumer Product Safety Commission that indicated the second largest number of complaints from consumers related to carbonated soft drinks for the period extending from November, 1970, to December, 1974, was the propulsion of bottle caps, most often being the aluminum type of caps at issue here. Yet Overturf gave a negative response to the inquiry of whether the bottle cap blow-off problem was serious. When pressed, Overturf took the position that the number of injuries would have to be greater than 127 between 1967 and 1975 for the problem to be considered serious.

Given the apparent state of Alcoa's knowledge concerning bottle cap blow-offs, it was understandable that Alcoa prepared wall charts showing pictures of improperly applied caps and a slide show presentation detailing the problem and potentially dangerous results occurring from bottle-cap blow offs. As already noted in the Supreme Court's opinion, however, J.F.W. did not receive a wall chart until well after Alm was injured and apparently, none of the employees of the J.F.W. bottling plant ever saw the slide show presentation. Further, we have already passed upon the "warning" which Alcoa asserts it included in the 1970 Owner's Manual that went with the capping machine, and, in any event, J.F.W. employee, Ferro, testified he never saw the manual until shortly before trial. Also J.F.W. evidently never received the 1970 Gibb's report (earlier referred to), and evidence at trial demonstrated that Mr. Richrd Condra, an Alcoa technical service representative, was not even aware of the problem with blow-offs before trial. The technical service representatives were responsible for calling on bottlers and servicing their capping machines, designed by Alcoa. Mr. Stephen Matisko, superintendent of capping machine technology service and the national supervisor of all technical service representatives for Alcoa since 1974, testified there was no indication from the technical representative services reports that "any specific document, letter, piece of paper, slide show, movie, video film, anything that indicates that Seven-Up Bottling Company, Houston Seven-Up, as it is called, or J.F.W., was ever advised about the specific hazard of an eye injury from these blow-offs prior to June 3, 1976." Finally, evidence of a letter was produced which indicated that Matisko instructed a technical service representative, who had made a service call on J.F.W. six months before Alm's injury, to advise J.F.W. of the need for period checking of the head sets on the capping machines and the hazards that can result from misapplication. Matisko requested this letter be sent be-

cause of a report the technical service representative had sent Alcoa. Although he instructed a copy be sent to him, Matisko admitted on cross-examination he possessed no records to indicate the letter be requested to be sent warning J.F.W. of the hazard of misapplication was ever written.

During the trial Alcoa took the position it was utilizing efforts directed towards bottlers to get them to turn our properly threaded caps to the consuming public. Alcoa did not, and quite apparently could not take the position it was unaware of injuries occurring as a result of bottle cap blow-offs. While the record is replete with evidence clearly showing Alcoa was aware of the situation, the record is virtually silent concerning Alcoa's efforts to warn and instruct J.F.W. The means demonstrated by Alcoa as techniques to alert the bottlers who used the Alcoa patented capping machine, about the hazards of misapplied caps, were evidently never shared with J.F.W. Alcoa's awareness that J.F.W. remained uninformed of the problem was demonstrated by the non-production at trial of memos or documentation, normally kept by Alcoa as evidence something had been done to instruct the bottlers. The combination of Alcoa's awareness of the hazards associated with misapplication, and their apparent lack of any effort to inform and, or, educate J.F.W. before the date of Alm's injury, constitutes some evidence before the jury of an entire want of care indicating Alcoa's conscious indifference. We hold the evidence was legally sufficient to sustain the jury's finding of gross negligence.

We now address the factual sufficiency of the evidence and thus consider and weigh all the evidence, both in support of and contrary to the challenged finding. In so passing, this court is mindful of *Herbert v. Herbert*, 754 S.W.2d 141 (1988); *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex.1986); and is aware we must uphold the jury's finding unless we find the evidence is so weak or the finding is so against the great weight

and preponderance of the evidence as to be manifestly erroneous or unjust.

We incorporate our legal sufficiency analysis into this discussion of the factual sufficiency of the evidence and consider Alcoa's argument against their alleged failure to invent a fail-safe mechanical inspection system. Alcoa put on the testimony of their expert, Dr. Block, who testified, as did Overturf, that the closure was designed so that any misapplication which would be significant enough to result in a premature release would result in a repeated misapplication. With this fact in mind, the visual "batch-and-hold" inspection procedure utilized before Alm's injury was a reasonable and safe procedure. The principle of the "batch-and-hold" procedure is that every cap misapplication which can cause a blow-off is very apparent *and* is always the result of a misadjustment in the machine which has been subsequently repeated. Consequently, such a misapplication will appear in a number of bottles and can be traced back to a specific problem with the capping machine. If *properly followed*, the "batch-and-hold" procedure should always be effective in catching misapplied caps with blow-off potential.

Alm's expert, Mr. George Green, and J.F.W. plant superintendent, Ferro, both testified, however, that bottle caps which are the product of intermittent misapplications can also have blow-off potential *and* can easily go undetected in a "batch-and-hold" inspection procedure. Such intermittent misapplications are not the result of machine misadjustments but, according to Ferro, can result in improperly formed threads. Yet, Ferro affirmed that J.F.W. was operating on a close budget in 1975 and 1976, and as a result he was unable to have the additional line personnel he had wanted. It is clear that the "batch-and-hold" procedure had to be properly followed and that this was something over which J.F.W. had control. Notably, Green admitted he did not know whether the Alm cap was the product

of repeated or intermittent misapplication failure. Furthermore, while Green testified that an engineer should and could have designed a fail-safe mechanical type inspection system, the evidence showed no such device exists or is in use today. Significantly, because of the financial pressures experienced in 1975 and 1976, J.F.W. went without additional equipment Ferro admitted he would have liked to have had, as well as a proper application tester. With this in mind we find it difficult to find the evidence factually sufficient that Alcoa was grossly negligent for not including as a part of its capping machine an automatic mechanical inspection device.

Next, we consider whether the evidence was factually sufficient to prove Alcoa was grossly negligent by designing and offering a cap with a pilfer-proof band. The problem with the pilfer-proof band on the caps is caused by the propensity of the band to retain even an unthreaded cap until a consumer breaks the band, causing the cap to then blow off and potentially cause injury. Apparently, the slight force exerted by the pilfer-proof band will prevent a misapplied cap from blowing off in the bottling plant, or a similarly innocuous place. Alcoa argues they offered the pilfer-proof band only as an optional feature and they also offered caps without this feature. Many of the bottlers opted for the protected cap because of prior incidents of food tampering. Alcoa also offered evidence that the feature promoted cleanliness and helped in detecting spoilage.

Green opined, however, that the pilfer-proof band should not have been used and, he added, an average engineer would not have used one. Alcoa employee, Gibbs, testified the ring was responsible for holding the cap on in the Alm case by acting as an additional thread. Gibbs also admitted Alcoa had tested the pilfer-proof band in a situation with weak threads where it was essentially the ring part of the closure holding the cap on the bottle and preventing premature blow-off. We conclude from this that the pilfer-proof band did increase the

likelihood of blow-offs involving personal injury, and that Alcoa was aware of this hazard. We hold, however, that the evidence greatly preponderates that Alcoa kept Seven-Up informed of this hazard.

Alcoa offered into evidence correspondence between Seven-Up, the parent soft drink company, and Alcoa, concerning slide show presentations, training seminars, etc., on proper application of the Alcoa beverage closure. Among the documents were interoffice memos from Alcoa. Alm objected to the admission of this evidence, arguing it was self serving and lacked relevancy. The court admitted the evidence, but on a limited basis, to the extent it related to the allegations of gross negligence and therefore, the conduct, care and effort expended by Alcoa before the date of Alm's injury. Among the documents admitted was a memo dated July 27, 1972, reflecting all those in attendance for a slide show presentation put on by Alcoa. Importantly, a representative from Seven-Up was included on the list. The slide show was entitled "Proper Application of the Alcoa Beverage Closure" and initially showed a 28 M/M bottle topside *with a pilfer-proof cap*. Significantly, the aluminum cap dealt with in the slide presentation was a pilfer-proof cap, and in the first ten slides out of more than one hundred included in the presentation, there was a clear depiction of the explosive and potentially dangerous nature of bottle cap blow-offs. The danger was demonstrated by a cartoon portraying, on three successive slides, a consumer starting to open an aluminum twist off carbonated beverage and the cap unexpectedly flying off, breaking the glass of a nearby window. The terrific force required to propel a bottle cap through glass depicted the great potential for bottle cap blow-offs to cause personal injury.

In another memo transmitted within Alcoa, at least eight individuals with titles indicating policy and decision making positions within Seven-Up were recorded as having viewed

the slide show. Subsequent memos indicated follow up efforts by Alcoa to keep Seven-Up informed of the potential hazard. The Supreme Court stated “[t]he issue in every case is whether the original manufacturer has a reasonable assurance that its warning will reach those endangered by the use of its product.” 717 S.W.2d at 591. Alcoa and Alm appear to agree that the parent soft drink company, Seven-Up, controlled the graphics and art work on the bottles produced by J.F.W. and, therefore, neither Alcoa, J.F.W., or anyone else, other than Seven-Up, could control what appeared on the bottles. Here, Alm asserts that Alcoa did not, but could have, required anyone who operated under their patent, to put a warning on the product. We are not prepared to say an original designer-manufacturer is charged with a duty to require an appropriate intermediary to take specific action, particularly if the original designer-manufacturer has no reason to believe it necessary. The evidence of Alcoa’s efforts to instruct and warn Seven-Up revealed Alcoa was receiving positive feedback from Seven-Up which would indicate such “reasonable assurance,” without Alcoa’s resorting to contractual measures.

Importantly, the evidence on the issue of gross negligence was not well developed in light of the Supreme Court’s new rule. Although the charge did not literally suggest that the trial court was instructing the jury that the only evidence relevant to the question of Alcoa’s conscious indifference to Alm’s welfare would be the evidence of warning by Alcoa directly to consumers, as Alcoa asserts, the trial did proceed in such a way that Alcoa could not have vitiated its liability without showing it had adequately warned Alm or at the very least J.F.W. Because exemplary damages are punitive in nature and imposed to set an example for others, *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex.1985), we feel it would be manifestly unjust to find the evidence factually sufficient to uphold them here.

The evidence Alcoa produced of its warning to Seven-Up indicated Seven-Up was adequately trained (i.e. the slide show) and warned about as well as familiar with, the propensities of the product and capable of passing on a warning. Alcoa's conduct in warning and instructing Seven-Up effectively negates both the objective and subjective tests in *Williams v. Steve's Industries, Inc.*, 699 S.W.2d 570 (Tex.1985). *Williams* provides that a plaintiff may prove a defendant's gross negligence by proving the defendant had actual subjective knowledge that his conduct created an extreme degree of risk. A plaintiff may also prove a defendant's gross negligence objectively, by proving that under the surrounding circumstances a reasonable person would have realized his conduct created an *extreme* degree of risk to the safety of others. *Id.* at 573. Importantly, the term "conscious indifference" used in the definition of gross negligence underscores the apparent decision, despite *extreme* risks to another party, of the defendant's lack of care about the consequences of the act which may ultimately lead to that harm. 699 S.W.2d at 573, [emphasis ours]. The evidence of conscious indifference was not factually sufficient here.

Alm argues that given the facts in general, with Alcoa's inadequate warning to J.F.W. and complete absence of warning to the consuming public, this court must find sufficient evidence to support punitive damages against Alcoa. We do not agree. All of the evidence of Alcoa's knowledge and failure to warn the public is not conclusive as to the issue of gross negligence. Overturf's responses, indicating his equivocal attitude about warning the public of the potential dangers associated with blow-offs, which are heavily cited by Alm, cease to demonstrate the conscious indifference elementary to gross negligence when it is shown that Alcoa was making an effort to deal with and extinguish the problem by alerting Seven-Up. The evidence showed that officials of Seven-Up and other

bottling companies viewed the slide show, which began with an explicit warning of the hazard involved and continued with a technical pinpointing of the problem. We realize the issue is raised concerning adequacy of a warning, and that this is a fact question which we may not decide. Of course, this court is not precluded from finding the evidence factually insufficient to support the jury finding of punitive damages based on that warning. Since punitive damages is the only issue we cannot sustain following our review, made pursuant to the Supreme Court Mandate, we hereby remand to the trial court on the issue of gross negligence only. *Olin Corp. v. Dyson*, 678 S.W.2d 650 (Tex.App.—Houston [14th Dist.] 1984, rev'd on other grds.)

TEX.R.APP.P. 81 allows this court to order a new trial exclusively on issues affected by error in a case "if it appears that the error *affects a part only* of the matter in controversy and that such part is *clearly separable* without unfairness to the parties," [emphasis added]. See *Harder v. Sanders*, 155 Texas. 149, 284 S.W.2d 144 (1955); *Blackmon v. Nelson*, 534 S.W.2d 439 (Tex.Civ.App.—Texarkana 1976, no writ). Here, it is instructive to refer to the recently enacted provision in the Texas Civil Practice and Remedies Code on exemplary damages. In codifying past case law, the code states that exemplary damages may be awarded only if the claimant proves fraud, malice, or gross negligence. Tex.Civ.Prac. & Rem. Code Ann. § 41.003(a) (Vernon Supp.1988). Furthermore, the statute provides that the burden of proof for exemplary damages may not be satisfied by evidence of ordinary negligence § 41.003(b). This is, in fact, only logical as compensatory and exemplary damages are treated and characterized as completely different legal forms of relief. While the purpose behind exemplary or punitive damages is not only to punish the wrongdoer but also to make an example of him, *Hofer v. Lavender*, 679 S.W.2d 470 (Tex.1984), the purpose behind

compensatory or actual damages is simply to make the claimant whole. Consequently, when the jury considers the evidence for punitive damages, their focus is on the defendant and his behavior, whereas for compensatory damages the jury's focus must be on the claimant. Such is the nature of punitive damages, in relation to compensatory, that there is no need for a precise ratio between the two. *Alama Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex.1981).

Consistent with this reasoning is a discussion from a recent case out of our sister court, addressing the trial court's error in submitting a comparative fault issue and attempting to use it to reduce the appellant's gross negligence issue. The court opined:

"gross negligence" inquires about intent, i.e., "conscious indifference," while ordinary "negligence" inquires about "ordinary care," regardless of intent. Because "negligence" and "gross negligence" are different theories on which a recovery may be obtained, and because a recovery under either theory depends on separate and distinct elements of proof, the two are not comparable. *Otis Elevator Co. v. Joseph*, 749 S.W.2d 920 Tex.App.—Houston [1st Dist] n.w.h.).

We affirm the judgment on ordinary negligence and reverse and remand on the reinstated issue of punitive damages.

SEARS, Justice, concurring and dissenting.

I concur with the majority opinion in remanding the gross negligence issue for a new trial; however, I dissent from the affirmance of the negligence findings based on a failure to warn J.F.W., and dissent from the majority finding that the

evidence was legally sufficient to support the jury's finding of gross negligence.

I believe our review on remand should include whether Alcoa satisfied its duty to warn Alm by adequately warning *Seven-Up*. The supreme court's remand directs this court: "... to consider Alcoa's factual insufficiency points regarding the adequacy of its warning of the hazard of cap blow off to JFW. . . ." *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 595 (Tex.1986). (Emphasis added.)

The supreme court concluded Alcoa had a duty to adequately warn the consumer, but held that duty could be discharged by adequately warning "the intermediary." *Alm v. Aluminum Co. of America*, 717 S.W.2d at 595. However, *Seven-Up* is the only intermediary with the authority and the means to include a warning on the bottle or the bottle cap. I do not believe the Supreme Court intentionally limited our review of the warnings Alcoa gave JFW.

Pursuant to the franchise agreement between *Seven-Up* and JFW, *Seven-Up* had control of package shapes, components, labels, graphics and contents. Alm argued that *Seven-Up* controlled warning labels, and Alm vigorously argued to this court that Alcoa could not satisfy its duty to warn Alm by warning JFW, *because Alcoa had a duty to warn Seven-Up*. Yet, when Alcoa presented evidence of its warnings to *Seven-Up*, Alm objected to the testimony and the evidence on the ground that it was irrelevant and self-serving. That evidence included a graphic 35mm slide presentation showing the danger inherent in cap blow-off. The evidence further indicated that Alcoa showed the slide presentation to *Seven-Up* personnel in Texas and in many other states. The presentation was made to the *Seven-Up* Vice-President of Quality Control, Manager of Field Technical Servicers, Manager of Package Engineering, Manager of Contract Bottling and Canning, Midwestern Technical Manager, Eastern Technical Manager, South Central Technical

Manager, Western Technical Manager, Quality Control Manager and others. The slide presentation was also shown to Pepsi-Cola, R.C. Cola, Anhauser-Busch, Contract Beverage Packagers, Inc. and others. The evidence showed that presentations were also arranged for Vess Beverages, Dad's Root Beer and Coca-Cola. Alcoa presented evidence of many office memos to bottlers warning of the hazards of the improper application of closures, improper adjustment of bottling machines and safety in general. Letters from Seven-Up personnel thanking Alcoa for the presentation and for enlightening Seven-Up, as well as letters from Alcoa requesting permission to show the slide presentation to other Seven-Up bottlers, were admitted into evidence.

Alcoa does not own the bottles, the caps or their contents. Alcoa has no means by which it can adequately warn a consumer of the hazards of a misapplied bottle cap. Therefore, it prepared a slide presentation depicting the danger and showed it to the intermediary, Seven-Up, who alone possessed the means by which this warning could be passed on to a potential consumer.

Because Alm objected to the evidence of Alcoa's warnings to Seven-Up, and because Alm succeeded in limiting the jury's application of such evidence to the facts of this case, the jury was denied the opportunity to determine if Alcoa's warnings to Seven-Up were adequate to discharge its duty to warn Alm. Therefore, I would also remand the issue of ordinary negligence to the trial court for a new trial consistent with the new rule fashioned by the Supreme Court. *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 592 (Tex.1986).

APPENDIX C

James E. ALM, Petitioner.

v.

**ALUMINUM COMPANY OF
AMERICA, et al., Respondents.**

No. C-4093.

Supreme Court of Texas.

July 2, 1986.

Rehearing Denied Nov. 5, 1986.

KILGARLIN, Justice.

James Alm presents three issues for decision by this court: (1) whether Aluminum Company of America (Alcoa), the designer of a closure system for soft drink bottles, had a duty to warn consumers of the hazard of bottle cap blow off; (2) whether the trial court properly disregarded the jury's findings of gross negligence; and, (3) whether the court of appeals applied the correct legal standards in reviewing the factual sufficiency of the evidence supporting the jury's finding of ordinary negligence.

The trial court rendered judgment for Alm based on the jury's favorable verdict. The court of appeals, with one justice dissenting, reversed that judgment, holding that the evidence pertaining to certain alleged acts of negligence was factually insufficient to support the jury finding against Alcoa. Additionally, the court of appeals held that Alcoa did not have a duty to warn consumers of the hazard of bottle cap blow off. 687 S.W.2d 374. We reverse the judgment of the court of appeals in part and affirm it in part.

During the 1960's, Alcoa designed, patented, manufactured, and marketed a closure system for applying aluminum caps to carbonated soft drink bottles. In 1969, Alcoa sold such a capping machine to JFW Enterprises, Inc., the owner of the Houston 7-Up Bottling Company. The capping machine applied Alcoa-designed 28 millimeter pilfer-proof aluminum caps to soft drink bottles of various sizes. JFW purchased the aluminum capping material from W.H. Hutchinson & Son, Inc. W.H. Hutchinson manufactured the Alcoa-designed and patented resealable caps under licensing agreements with Alcoa.

On June 3, 1976, James Alm suffered a sever eye injury when an aluminum bottle cap exploded off a 32-ounce bottle of 7-Up. Alm had purchased the bottle of 7-Up at a Lewis and Coker supermarket. Lewis and Coker had purchased the bottle from JFW Enterprises.

Alm sued Lewis and Coker, JFW, and Alcoa under theories of strict liability and negligence but settled with Lewis and Coker and JFW before trial. Alcoa filed a cross-action against JFW and Lewis and Coker. The jury found against Alcoa on all the submitted liability issues. However, the trial court disregarded the jury's answers to special issues 1 through 6, stating that strict product liability did not apply to Alcoa. The trial court also disregarded the jury's answers to issues 11 and 12, finding the answers were "against the great weight and overwhelming preponderance of the evidence." In issue 11, the jury found Alcoa was grossly negligent, and in issue 12, it awarded Alm one million dollars in exemplary damages. The trial court rendered judgment on the jury's answers to the remaining issues, which found Alcoa 55% negligent and JFW 45% negligent. Alm was awarded \$300,500 as his actual damages.

The question of Alcoa's negligence was broadly submitted in one issue. The court of appeals set out and considered four alleged act of negligence by Alcoa:

- (1) Alcoa negligently designed the bottle and cap in that the threads on the bottle to be impressed into the cap were too shallow;
- (2) Alcoa negligently designed the cap by including an optional pilfer-proof band on the cap;
- (3) Alcoa was negligent in recommending to bottlers a visual inspection system based upon the batch and hold principle of quality control, as opposed to inventing or devising some fail safe system of inspection for use by bottlers;
- (4) Alcoa was negligent in failing to adequately warn the bottler (JFW) and/or the plaintiff about the risk that an improperly applied cap could blow-off and cause personal injury.

687 S.W.2d at 378. The court of appeals concluded the evidence was factually insufficient to support a finding of negligence as to the first three alleged acts. As to whether Alcoa was negligent in failing to warn JFW and/or Alm, the court of appeals held that Alcoa had no duty to warn Alm. The court held Alcoa did have a duty to warn JFW, but concluded the jury had impliedly found that Alcoa's warning to JFW was adequate.¹ 687 S.W.2d at 382.

Alm contends that Alcoa owed a duty to warn consumers such as himself of the hazard of bottle cap blow off. It is a long standing principle in this state that a duty of care arises when conditions are such that a "prudent person would have anticipated and guarded against the occurrence which caused" another's injury. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 98 Tex. 535, 865 S.W. 57 (1905). As this court recently

¹ This is ironic. The jury had found that Alcoa failed to warn JFW of the potential of hazardous bottle cap blow off, but this was one of the issues disregarded by the trial court. Alm assigned no point of error as to this, however.

stated, a person has a duty to act as a "reasonable prudent person would act under the same or similar circumstances regarding any reasonably foreseeable risk." *Colvin v. Red Steel Co.*, 682 S.W.2d 243 (Tex.1984).

Alcoa argues that it owed no duty to warn Alm as it was not the manufacturer or seller of any component part or the final product which injured Alm. Alcoa was, however, the designer and marketer of the closure process, the designer of the cap, and the designer, manufacturer, and seller of the capping machine.

ALCOA AS DESIGNER

Whether a designer who is not a manufacturer has a duty to warn of hazards associated with the use of its designed product has not before been addressed by this court. A manufacturer has long been held to have a duty to exercise ordinary care in the design of a product. *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867 (Tex.1978). A designer who is not also the manufacturer should share the same duty to develop a safe design. Alcoa has a duty to exercise ordinary care in the design of its closure system. In fact, Alcoa does not dispute that it owes Alm a duty to design its closure system in a non-negligent way.

A manufacturer, as well as all suppliers of a product, also has a duty to inform users of hazards associated with the use of its products. Restatement (Second) of Torts § 388 (1965); *Olivarez v. Broadway Hardware, Inc.*, 564 S.W.2d 195 (Tex.Civ.App.--Corpus Christi 1978, writ ref'd n.r.e.). There is no reason to distinguish a designer, who has intimate knowledge of a designed product, from a retailer, wholesaler or manufacturer. Alcoa designed the closure system. It is the failure of that system which caused Alm's injury. There can be no justification for requiring a user of Alcoa's closure tech-

nology to warn of its hazards while not holding Alcoa to the same duty. The issue in a negligent failure to warn case is simply whether a reasonably prudent person in the position of the designer would warn of hazards associated with the designed product. Alcoa had a duty to warn of the hazards associated with its closure technology if a reasonably prudent person in the same position would have warned of the hazards.

ALCOA AS MANUFACTURER

While no Texas court has ever held a manufacturer precisely in the position of Alcoa liable, at least one court of another jurisdiction has. In *Fabbrini Foods, Inc. v. United Canning Corp.*, 90 Mich. App. 80, 280 N.W.2d 877 (1979), the plaintiff recovered against three defendants, including the designer/manufacturer of a filling machine used by a mushroom canner. The plaintiff had received contaminated mushroom cans produced by the canning machine. Alcoa's position as a remote manufacturer of the capping machine should not insulate it from liability when its negligence proximately causes damages.

Alcoa supplied a capping machine to JFW. Alcoa knew that through use its capping machine would go out of adjustment, thereby causing misapplied caps. And Alcoa knew of the risk of personal injury from bottle cap blow off at least as early as 1970. Alcoa had a duty to warn users of the hazard of improperly applied caps.

Alcoa argues and the court of appeals held that Alcoa satisfied its duty to warn of this hazard of bottle cap blow off by adequately warning JFW. We agree that a manufacturer or supplier may, in certain situations, depend on an intermediary to communicate a warning to the ultimate user of a product. However, the mere presence of an intermediary does not excuse the manufacturer from warning those whom it should reasonably expect to be endangered by the use of its product. The

issue in every case is whether the original manufacturer has a reasonable assurance that its warning will reach those endangered by the use of its product. *Hopkins v. Chip-In-Saw, Inc.*, 630 F.2d 616 (8th Cir.1980); *Gordon v. Niagara Machine and Tool Works*, 574 F.2d 1182 (5th Cir.1978); *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir.1973); *Doss v. Apache Powder Co.*, 430 F.2d 1317 (5th Cir.1970); *Weekes v. Michigan Chrome and Chemical Co.*, 352 F.2d 603, 607 (6th Cir.1965).

In some situations, courts have recognized that a warning to an intermediary fulfills a supplier's duty to warn ultimate consumers. For example, when a drug manufacturer properly warns a prescribing physician of the dangerous propensities of its product, the manufacturer is excused from warning each patient who receives the drug. *Cooper v. Bowser*, 610 S.W.2d 825, 830-31 (Tex.Civ.App.--Tyler 1980, no writ); *Gravis v. Parke-Davis and Co.*, 502 S.W.2d 863, 870 (Tex.Civ.App.--Corpus Christi 1973, writ ref'd n.r.e.). The doctor stands as a learned intermediary between the manufacturer and the ultimate consumer. Generally, only the doctor could understand the propensities and dangers involved in the use of a given drug. *Gravis*, 502 S.W.2d at 870. In this situation, it is reasonable for the manufacturer to rely on the intermediary to pass on its warnings. However, even in these circumstances, when the warning to the intermediary is inadequate or misleading, the manufacturer remains liable for injuries sustained by the ultimate user. *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex.1978); *Crocker v. Winthrop Laboratories, Division of Sterling Drug, Inc.*, 514 S.W.2d 429 (Tex.1974).

Some courts have also held that a bulk supplier, one who sells a product to another manufacturer or distributor who in turn packages and sells the product to the public, need only warn its intermediate distributor and not each individual consumer. See *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549

P.2d 1383 (1976). *But see Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 581 P.2d 271 (Ariz.App. 1978). But again, the issue is whether the supplier's reliance on the intermediary is reasonable. In determining whether a bulk supplier's duty to warn extends to ultimate users of a product, courts may consider whether the distributor is adequately trained, whether the distributor is familiar with the properties of the product and its safe use, and whether the distributor is capable of passing on its knowledge to consumers. *See Khan v. Velsicol Chemical Corp.*, 711 S.W.2d 310 (Tex.App.--Dallas 1985, writ ref'd n.r.e.); *Jones v. Hittle Service, Inc.*; *Shell Oil Co. v. Gutierrez*.

Alcoa's position in the chain of design, manufacture, and distribution undoubtedly makes it difficult for Alcoa to directly warn consumers of the hazard of bottle cap blow off. Alcoa's position is somewhat analogous to that of a bulk supplier in that Alcoa has no package of its own on which to place a warning and no control, except by contractual requirements, over the final package labeling which reaches consumers. Therefore, Alcoa should be able to satisfy its duty to warn consumers by proving that its intermediary was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning. But, if Alcoa failed to adequately warn and train JFW or if JFW was incapable of passing on the received warning, Alcoa would not have discharged its duty to the ultimate consumer.

The adequacy of a warning is a question of fact to be determined by the jury. *Bituminous Casualty Corp. v. Black and Decker Manufacturing Co.*, 518 S.W.2d 868, 873 (Tex.Civ.--App.Dallas 1974, writ ref'd n.r.e.). Because the issue of negligence was broadly submitted in this case, there is no explicit finding by the jury as to the adequacy of Alcoa's warning to JFW. Special issue 7 asked:

Do you find that the negligence, if any, of any or all of the following parties proximately caused the occurrence made the basis of this suit:

Answer "Yes" or "No" beside the name of each party listed:

Alcoa _____

JFW _____

James E. Alm _____

The jury answered yes as to Alcoa and JFW but no as to Alm.

In spite of the disregarded jury finding to the contrary, the court of appeals concluded there was an implied jury finding that Alcoa's warning to JFW was adequate. That court reasoned that in finding JFW's negligence was a proximate cause of Alm's injuries, "[t]he jury impliedly found that J.F.W. knew or should have known, because of the warning given by Alcoa, that a misapplied cap would result in personal injury." This analysis is seriously flawed. Certainly the jury could have determined that JFW was negligent without believing that Alcoa adequately warned JFW of the hazards associated with bottle cap blow off. There were, after all, other allegations of negligence against JFW. The court of appeals cannot infer a jury finding from issues inquiring as to JFW's negligence and then use that inferred finding to invalidate an express jury finding that Alcoa's negligence proximately caused Alm's injuries. The court of appeals should have considered the evidence supporting the jury's finding that Alcoa was negligent without reference to the jury's finding that JFW was negligent.

The court of appeals determined that Alm pleaded and attempted to prove four alleged acts of negligence by Alcoa. In order to find that Alcoa's negligence proximately caused Alm's injuries, the jury must have found that at least one of those

four allegations as to Alcoa's conduct was true. One allegation was that Alcoa's warning to JFW was inadequate. We must consider whether there was some evidence to support a finding as to that aspect. In deciding a no evidence point, an appellate court must consider only the evidence and inferences tending to support the finding and disregard all evidence and inferences to the contrary. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965).

The record shows that the only "warning" given JFW of the hazards associated with bottle cap blow off came in an Alcoa owner's manual distributed with its capping machine. The statement in that manual read: "Leakage or closure blow off at lower pressures can occur when the closure application is improper or the glassware is not within specification." The statement did not warn that serious personal injuries could result from cap blow off. The language was not designated as a warning, and it was not set off in type different from that used throughout the manual.

In the same year Alcoa issued its manual, 1970, an Alcoa employee, Jaye Gibbs, prepared a report which stated, "[p]robably the most critical area of closure performance for this market is the closure's ability to retain the package's internal pressure inherent to carbonated products. Faulty performance can cause serious injury to a would-be consumer if the closure blows off." Alcoa's representative, George Overturf, testified that this report was not made available to bottlers using the Alcoa capping machine. No summary of this information or further warning was given JFW. Further, although Alcoa's representative testified that the incidence of cap blow off did not increase, Alcoa issued a manual in 1977 which specifically warned that "on occasion, an improperly applied closure can be violently ejected by pressure in a package. This can cause serious injury to handlers or consumers." From this evidence the jury could reasonably have concluded Alcoa's warning in 1970, not subsequently supplemented, was inadequate.

In discussing what measures Alcoa took to inform bottlers of the hazard associated with misapplied caps and cap blow off, Overturf testified that in 1972 Alcoa developed a slide presentation for bottlers. The slide presentation included a depiction of a bottle cap blowing off and breaking a window. The accompanying text read:

A capped bottle containing carbonated beverage is, very simply, a container under pressure, pressure that is harmless when released gradually, but having substantial propellant force when released suddenly. When the consumer starts to remove an improperly applied closure, the pressure inside the bottle may spontaneously remove the closure, to the surprise of the consumer and to the detriment of anything that the closure strikes. It would be a mistake not to recognize that an improperly applied closure could be a potential hazard to the consumer.

Overturf also testified that Alcoa distributed wall charts to bottlers beginning in 1973, showing proper and improper cap application. And, finally, Overturf testified that Alcoa's technical service people informed bottlers about bottle cap blow off.

Overturf testified that he personally did not know which of this information, slide presentation, wall charts, or technical service instruction, was provided JFW. Stephen Matisko, superintendent of capping machine technology service for Alcoa, testified that it was common practice for Alcoa to receive a written report when a bottler was shown the Alcoa slide presentation or when a bottler was furnished an Alcoa wall chart. Matisko admitted that there was no document which showed that JFW ever saw the slide presentation or received a wall chart.

Charles Ferro, the plant superintendent for JFW, testified that he had never seen Alcoa's slide presentation. Ferro also testified that he had not received a wall chart from Alcoa until two weeks before trial. Additionally, Ferro testified that he was not familiar with the hazards associated with misapplied caps and that Alcoa had never told him of any hazard associated with bottle caps blowing off.

Finally, Richard Condra, a technical service representative for Alcoa, was asked whether he informed JFW that people were getting injured across the country from cap blow offs. Condra responded that he did not know people were being injured, that Alcoa had never told him that people were being injured, and thus, he had no reason to inform JFW.

This evidence clearly constitutes some evidence, certainly more than a scintilla, that Alcoa inadequately warned JFW. Therefore, the court of appeals erred in holding that the jury impliedly found Alcoa's warning to the bottler to be adequate.

Alm next complains of the trial court's disregarding the jury's finding of gross negligence. In its judgment, the trial court stated that it "disregarded and set aside the Jury's answers to Questions Numbers 11 and 12 because the court finds that, while there is some evidence to support such answers of the Jury, such answers to Questions Numbers 11 and 12 are against the great weight and overwhelming preponderance of the evidence."

Rule 301, Texas Rules of Civil Procedure, expressly provides that a trial court may "disregard any Special Issue Jury Finding that has no support in the evidence." A trial court may not disregard a jury's answer because it is against the great weight and preponderance of the evidence. *Campbell v. Northwestern National Life Insurance Co.*, 573 S.W.2d 496, 497 (Tex.1978); *Garza v. Alviar*, 395 S.W.2d at 824. In such a situation, the trial court may only grant a new trial. *Gulf, Colorado and Santa Fe Railway Co. v. Deen*, 158 Tex. 466,

470-71, 312 S.W.2d 933, 937, cert. denied, 358 U.S. 874, 79 S.Ct. 111, 3 L. Ed.2d 105 (1958).

The trial court erred in disregarding the jury's answers to issues 11 and 12. We reinstate those answers. However, as Alcoa had no opportunity to complain of the sufficiency of the evidence to support the answers to issues 11 and 12, we remand to the court of appeals. In that court, Alcoa may raise sufficiency arguments as it chooses as to gross negligence and exemplary damages.

Alm lastly complains that the court of appeals incorrectly reviewed the factual sufficiency of the evidence supporting the jury's finding of ordinary negligence. Notwithstanding the finality of judgments of the courts of appeals on fact questions, this court has jurisdiction to determine if a correct standard has been applied by the intermediate court. *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex.1986); *Garza v. Alviar*, 395 S.W.2d 821 (Tex.1965); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1961).

The court of appeals discussed the factual sufficiency of the evidence supporting Alm's allegations that Alcoa negligently designed the bottle thread depth, negligently failed to include a mechanical inspection system, and negligently designed the bottle cap with a pilfer-proof band. We agree with the court of appeals that Alm failed to offer any probative evidence that the thread depth of the bottle was a proximate cause of his injury. From our reading of both the statement of facts and the court of appeals' decision, however, it appears that court did not consider all of the evidence in determining the factual sufficiency of the evidence supporting Alm's remaining two theories.

When reversing a trial court judgment on insufficiency grounds, a court of appeals must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. Further, the court of appeals

appeals must state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *Pool*, 715 S.W.2d at 635. The court of appeals failed to do those thing in this case.

Having concluded that Alcoa had a duty to adequately warn the consumer either directly or by warning the intermediary, we affirm in part and reverse in part the judgment of the court of appeals. We remand to that court for it to consider Alcoa's factual insufficiency points regarding the adequacy of its warning of the hazard of cap blow off toe JFW, and for the court to reconsider Alcoa's factual insufficiency points regarding its failing to include a mechanical inspection system and its designing the cap with a pilfer-proof band. Additionally, we remand to the court of appeals so that it may consider points Alcoa may choose to raise in respect to the jury's finding of gross negligence and exemplary damages.

GONZALEZ, J., files a dissenting opinion in which McGEE, J., joins.

GONZALEZ, Justice, dissenting.

While I agree that Alcoa owed a duty under the facts of this cause, I disagree with the court's other holdings. I dissent because the court:

- (1) addressed an inadequate warning theory for negligence liability which Alm neither pleaded nor submitted to the jury;
- (2) reverses the burden of proof on an issue regarding the adequacy of the warning;
- (3) usurps the court of appeals' jurisdiction for reviewing the factual sufficiency of the evidence; and
- (4) addresses the court of appeals' standard for reviewing the factual sufficiency of the evidence even though Alm did not assert such a complaint by point of error.

Alm pleaded that Alcoa was liable under both strict liability and negligence theories, the trial court, however, disregarded the jury findings on strict liability; Alm did not appeal this action. Thus, this is a negligence case.

Liability in a negligence action requires: (1) a legal duty owed one person by another; (2) a breach of that duty; (3) that the breach was a proximate cause of the injury; and (4) actual injury. *Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex.1984); W. KEETON, Et Al., PROSSER AND KEETON ON TORTS § 30, at 164-65 (5th ed. 1984). The threshold question of whether a duty exists in a given situation is a question of law for the court. *Jackson v. Associated Developers of Lubbock*, 581 S.W.2d 208, 212 (Tex.Civ.App.--Amarillo 1979, writ ref'd n.r.e.). See *Abalos v. Oil Development Co.*, 544 S.W.2d 627, 631 (Tex.1976). Our question is whether, under negligence principles, Alcoa, a manufacturer who sold a "capping machine" to a bottler, had a duty to warn consumers of a potential danger resulting from misapplied bottle caps.

DUTY

Dean Prosser notes that "duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff." PROSSER & KEETON, *supra* at 356. *Alcoa did not manufacture, distribute, or sell the injury producing product, the bottle cap.* Alcoa did, however, manufacture and sell another product, the capping machine. Alcoa knew that the capping machine could, without proper maintenance and operation, create a risk of misapplied caps. Alcoa owed a duty to consumers to act as a reasonable prudent manufacturer would act under the same or similar circumstances regarding any foreseeable risk. See *Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex.1984).

Alcoa's position, as a remote manufacturer, is relevant to the duty it owed consumers because it affects the extent of Alcoa's duty to warn and its ability to effectively distribute a warning. Significantly, Alcoa is the manufacturer of one product, the capping machine, while J.F.W. is the assembler of the injury producing product, the 7-Up bottle. Alcoa sold the capping machine to J.F.W. whose employees operated and maintained the machine. Alm was injured by a misapplied bottle cap which resulted from allowing the capping machine to get out of adjustment. J.F.W., an intermediate assembler, controlled the entire bottling process.

The mere presence of J.F.W. as an intermediary does not necessarily relieve Alcoa, the original manufacturer, of its duty to warn. When the original manufacturer gives a warning to an intermediate manufacturer or assembler, however, it can be relieved of its liability for the intermediary's failure to disseminate the warning. *See Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076, 1091 (5th Cir.1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). *See also Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir.1976); *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 156 N.W.2d 898 (1968); *Powell v. Standard Brands Paint Co.*, 166 Cal.App.3d 357, 212 Cal.Rptr. 395 (1985). In other words, when a manufacturer notifies an intermediary of the danger and the intermediary "proceeds to sell the product anyway, the manufacturer is insulated from liability." *Helene Curtis Indus. v. Pruitt*, 385 F.2d 841, 862 (5th Cir.1967), *cert. denied*, 391 U.S. 913, 88 S.Ct. 1806, 20 L.Ed.2d 652 (1968). Thus, the party's position in the chain of distribution is a factor to be considered in making the determination as to the existence of a duty to directly warn.

The Texas courts have applied a similar analysis in other duty to warn cases. For instance, and adequate warning to the physician relieves a drug manufacturer of its duty to warn the

consumer-patient of hazards associated with its product. *Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863, 870 (Tex.Civ.App.--Corpus Christi 1973, writ ref'd n.r.e.). See also *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex.1978); *Crocker v. Winthrop Lab's, Div. of Sterling Drug*, 514 S.W.2d 429 (Tex.1974); *Cooper v. Bowser*, 610 S.W.2d 825, 830-31 (Tex.Civ.App.--Tyler 1980, no writ). Because a warning on the drug package may not be understood, the duty to warn lies with the party who is in a position to give an effective warning, the doctor. Similarly, because as Alm's expert testified, the bottle was the optimum place for a warning, Alcoa's position as a remote manufacturer made it difficult for Alcoa to give an effective warning.

Another important consideration in determining the extent of Alcoa's duty to consumers is that *Alcoa never had physical control over the package or product which reached Alm*. In this regard, this cause is analogous to cases involving a bulk supplier who sells a product to another manufacturer or distributor who in turn packages and sells a finished product to the public. In *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383, 1394 (1976) the court held that the propane gas manufacturer did not have a duty to warn the ultimate consumer where he sells to a distributor who is familiar with the final product's dangerous propensities. The court notes that the manufacturer was unable to communicate an effective warning, by stating:

The wholesaler is seriously hampered in any attempt to communicate directly with the ultimate consumer. As pointed out in *Parkinson v. California Co.*, [255 F.2d 265 (10th Cir.1958)], the bulk wholesaler has no way of telling who the ultimate purchaser might be, and has no package on which to endorse any warning. The best the wholesaler could do would be

to furnish literature to his retailer and hope it was passed on -- a chancy operation at best. We fail to see how this procedure improves upon a situation where the wholesaler deals with a knowledgeable retailer. In either event the wholesaler must depend on his vendee to pass on his message, and cannot do so himself.

Id. at 1394. See also *Weekes v. Michigan Chrome & Chem. Co.*, 352 F.2d 603 (6th Cir.1965). Thus, the court held that the wholesaler's duty to warn consumers only extended to warning the distributor who packages the product for consumption by the public.

In acting as a reasonably prudent manufacturer would act under the same or similar circumstances regarding the foreseeable risk, Alcoa owed a duty to Alm which required warning J.F.W. of the risk to consumers by misapplied caps. Alcoa breached its duty to Alm if it did not warn, or did not adequately warn, J.F.W.

PRESERVATION OF INADEQUATE WARNING THEORY

Alcoa provided J.F.W. with a 1970 owner's manual containing the following warning:

Leakage or closure blow-off at lower pressures can occur when the closure application is improper . . .

Alcoa, then, did warn J.F.W. that caps could blow-off if the capping machine was not properly adjusted to prevent misapplication.

Alcoa still could have breached its duty to Alm if it inadequately warned J.F.W. *Alm, however, failed to plead either that Alcoa was negligent for failing to warn J.F.W. or that*

Alcoa was negligent for failing to adequately warn *J.F.W.* Further, Alm did not request an issue or instruction regarding the adequacy of the warning. The adequacy of the warning to *J.F.W.* is a question of fact. *Bituminous Casualty Corp. v. Black & Decker Mfg. Co.*, 518 S.W.2d 868, 873-74 (Tex.Civ.App.--Dallas 1976, writ ref'd n.r.e.). Alm, the party with the burden of establishing duty and breach of duty on a failure to warn theory, had the burden to plead and secure a jury finding that the warning to the intermediate assembler was inadequate. Tex.R.Civ.P. 279. Alm failed to do either.

Alcoa, on the other hand, properly objected to the submission of the broad negligence issue¹ which did not limit the jury's consideration to acts pleaded and proved.² In *Scott v. Atchison, Topeka & Santa Fe Ry.*, we observed that:

¹ The submitted issue read:

[Issue #7] Do you find that the negligence, if any, of any or all of the following parties proximately caused the occurrence made the basis of this suit:

Answer "Yes" or "No" beside the name of each party listed:

Alcoa:	Yes
J.F.W.:	Yes
James E. Alm:	No

[Issue #8] What percentage of the negligence that cause the injuries to James E. Alm do you find from a preponderance of the evidence to be attributal to each of the parties found by you to have been negligent?

Answer by stating the percentage, if any, opposite each name:

Alcoa:	55%
J.F.W.:	45%
James E. Alm:	0%
	100%

² Alcoa objected to the submission of these issues because:

1. There are no pleadings to support the submission of these issues.
2. There is no evidence, or in the alternative, the evidence is legally insufficient, or in the alternative, it is against the great weight and preponderance of the evidence to submit these issues.
3. These questions inquire as to the conduct of the parties without limitation to the pleadings and inquiries as to conduct for which Alcoa has not been

Under Rule 277, the trial court has the discretion to submit an issue broadly, including the combination in one issue of several acts or omissions which may be alleged to constitute negligence. However, when one or more pleaded acts or omissions are unsupported by evidence and the record contains evidence of other possible negligent acts or omissions which were not pleaded, failure to limit the broad ultimate fact issue to acts or omissions which were raised by both pleadings and proof violates Rule 277 and is error. In view of the wide variance between the pleadings and unpled facts and circumstances from which the jury could have inferred that the railroad was negligent, such error was reasonably calculated to and properly did cause the rendition of improper judgment.

572 S.W.2d at 273, 277 (Tex.1978).

Alcoa has shown a substantial variance. Alm pleaded allegations of negligence in the "design, testing, formulation, manufacture, preparation, inspection, instruction for the use of,

shown to have duty or responsibility. It further allows the jury to consider elements of negligence outside the pleadings and allows the jury to decide negligence and with proximate cause less than ten members agreeing on the same issue of negligence or proximate cause.

4. These questions are defective under the guidelines set out in *Scott v. Atchison, Topeka & Santa Fe Railway*, in that it fails to limit the question to the facts which have been plead and proved, and permits the jury to consider evidence outside the pleadings, such as, for example, facts relating to the capping machine and a failure to require a warning in the licensing agreement. Furthermore, *Scott* clearly describes the incorrectness of this issue because the jury is permitted to consider, with this question, allegations of negligence in the pleadings for which there is no proof and no evidence in the case, such as sale of the bottle, cap and contents in question and inspection of the bottle, cap and contents in question. Objection is specifically made to the absence of an instruction limiting the jury's consideration to negligent acts or omissions and proximate causal relationships supported by both pleadings and proof. For example, and without limitation, alleged negligence of Alcoa in failing to adequately warn [J.F.W.] was heavily focused as in the evidence, and yet no evidence was offered on proximate cause in this area.

warnings for the use of, servicing, sale, and distribution of the thirty-two (32) fluid ounce bottle, cap and contents of the '7-Up' soft drink in question." All these allegations are directed at the soft drink bottle. There is a total lack of any evidence in regard to most of these categories of negligence. While it can be argued that Alm's pleadings were based on a failure to warn consumers theory, it is not at all accurate to assert that Alm pleaded that Alcoa failed to warn, or failed to adequately warn, J.F.W.

On the other hand, Alm raised matters before the jury which were not supported by his pleadings and which could be construed by the jury as evidence of fault. For instance, Alm's expert testified about the potential for intermittent misapplication of the capping machine, even though the cap that injured Alm was misapplied because the machine was out of adjustment. Alm offered testimony by an "expert" on patent law that Alcoa could, through its licensing agreements, require others to include a warning on soft drink bottles. No support whatsoever in Alm's pleadings for any supposed negligent failure to enforce such agreements. Another area of variance dealt with Alcoa's "closure system." Alm's expert was allowed, over objection, to testify about alleged defects in the "Alcoa process enclosure." Alm attempted to hold Alcoa liable for negligence in its "closure system." Such allegation of negligence was clearly outside of its pleadings pertaining to the 7-Up bottle and cap. Finally, and most importantly, Alm, without pleadings, argued in trial that Alcoa failed to provide J.F.W. with an adequate warning. Yet, Alm failed to offer any evidence with respect to a proximate causal relationship; thereby implying negligence without any requisite proof on proximate cause.

Alcoa, then, complained of the lack of pleadings and proof in regard to whether Alcoa adequately warned J.F.W. The trial court overruled Alcoa's objection. Alcoa preserved error on this point in its motion for judgment *non obstante verdicto* and in its points of error presented to the court of appeals.

The court of appeals did not address this point because it held that the warning was adequate. The court of appeals' rationale was that because the jury affirmatively found that J.F.W. was negligent, the jury must have found that J.F.W. knew or should have known that its negligent act of misapplying the cap, or its own failure to warn, could foreseeably result in Alm's personal injuries. The rationale continues that because it is well established that one does not have a duty to warn a party already aware of a danger, the jury must have found that Alcoa adequately warned J.F.W., or did not need to warn, since J.F.W. was already aware of the danger. Thus, the court of appeals overlooked Alcoa's argument on the improper submission of the broad issue and arrived at a favorable result for Alcoa under its own analysis. The courts use of implied findings under Rule 279 was improper.

In our review of the judgment of the court of appeals, it is well settled that the party who prevailed in the court of appeals is entitled to have his assignments, which were properly presented in that court, considered by this court insofar as may be necessary to determine what judgment should have been rendered by the court of appeals. *McKelvy v. Barber*, 381 S.W.2d 59, 64 (Tex.1964); *Holland v Nimitz*, 111 Tex., 419, 232 S.W. 298 (1921). Moreover, we are required to examine the brief of the prevailing party in the court of appeals to determine if there is another ground on which its judgment should be affirmed. *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 809 (Tex.1980); *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 920 (Tex.1978); *McKelvy*, 381 S.W.2d at 64. Alcoa properly raised points of error in regard to the submission of a broad negligence issue that allowed the jury to find negligence on theories which were not pleaded such as Alcoa's alleged failure to adequately warn J.F.W.

Even though Alm did not plead that Alcoa failed to warn J.F.W. or that the warning was inadequate, and even though

there was no assertion by Alm in the briefs or during oral argument that these issues were tried by consent, the court remands this cause to the court of appeals because "there is some evidence of an inadequate warning." The court of appeals is then to determine whether the evidence is factually sufficient to support the jury's "subsumed finding" that Alcoa provided an inadequate warning to J.F.W. Because the jury found Alcoa negligent, the court holds that it "must" have found that Alcoa inadequately warned J.F.W. Yet, the jury did not have to find that Alcoa inadequately warned J.F.W., as it may have found Alcoa negligent for one of the other three alleged acts upon which the court of appeals remanded to the trial court for a new trial. Defendants now have burden to negate *all* pleaded and proved acts of negligence and even *all* unpleaded and objected to acts of negligence.

The court does not give defendants any opportunity to complain of the submission broad issues. In doing so, the court ignores this court's prior analysis in the *Scott* case. Basically, defendants are "thrown to the wolves" with regard to unpleaded or unsubmitted grounds of recovery that are "included" in broadly submitted issues.

BURDEN OF PROOF

The court states: "Alcoa should be able to satisfy its duty to warn consumers by proving that its intermediary was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning." 717 S.W.2d at 592. This is an unprecedented reversal of the burden of proof. Alm brought the cause of action; Alm had the burden to show Alcoa's warning to J.F.W. was inadequate. In an analogous products liability warning case, *Technical Chem Co. v. Jacobs*, 480 S.W.2d 602 (Tex.1972), this court observed that:

In the words of Dean Keeton, when a product is defective due to *inadequate labeling*, "the aspect of the defendant's conduct that made the sale of the product unreasonably dangerous [i.e., the label] must be found to have contributed to the plaintiff's injury." 48 Texas L.Rev. at 413. *This means that it is incumbent upon the plaintiff to secure a jury finding that the faulty labeling was a cause of the injury. It is this finding [plaintiff] failed to secure.*

Id. at 605 (emphasis added). As Alm failed to meet his burden; this cause should not be remanded to the court of appeals on a failure to adequately warn theory.

EVIDENCE REVIEW

The majority now overtly misapplies our decision in *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex.1986) for reviewing the court of appeals holdings on the factual sufficiency of the evidence. As foreseen, in reviewing factual sufficiency points, the *Pool* opinion can now be used to substitute this court's judgment for that of the court of appeals. *Pool*, 715 S.W.2d at 638 (Gonzalez, J., concurring).

The court remands this cause to the court of appeals for its "reconsideration" of "all" the evidence in determining whether there was factually sufficient evidence to support the jury's findings on two of Alm's ordinary negligence theories. In regard to the first theory, the court remands for reconsideration of Alcoa's alleged negligence in designing a cap with a pilfer-proof band. Because the lower court did not mention the testimony of Jaye Gibbs, this court implicitly holds that the court of appeals did not consider such testimony. Gibbs stated that Alcoa tested closures where the pilferproof ring was essentially the only thing holding a cap with weak threads on a bottle.

Gibbs further stated that from Alcoa's tests on pilferproof caps and caps without the pilfer-proof ring revealed that a similar result was reached with each. The court of appeals' failure to expressly mention this testimony should not be grounds for remanding to the court of appeals for their reconsideration of the factual sufficiency of the evidence.

The court next attacks the court of appeals' alleged failure to consider evidence in its factual sufficiency review on Alm's theory that Alcoa was negligent in failing to include a mechanical inspection system. The court of appeals failed to explicitly mention the testimony of Alm's expert, George Green, that a mechanical inspection was feasible and that he had in the past offered to design a system for Alcoa. Green states that there are several methods for assuming there is a good thread on cap, "[o]ne of them is a method of ultrasonic transducer." Another method involves a "shadowgraph." Green made these simple statements without reference to costs, efficiency, or utility. Green did not state that these methods would have prevented cap misapplication or the injury to Alm. I can hardly criticize the court of appeals for failing to set out these points in its opinion.

Other evidence exists in the record which supports the court of appeals' judgment. The court's remand to the court of appeals for its reconsideration on the sufficiency of the evidence was inappropriate for the two alleged acts of ordinary negligence. Henceforth, it appears that the court of appeals must summarize and transcribe the entire statement of facts. If it does not, this court can second guess the court of appeals whenever we do not agree with its assessment, utilizing *any* evidence the court of appeals does not mention in order to remand the cause to the court of appeals for its further review.

PRESERVATION OF FACTUAL SUFFICIENCY POINT

Alm only brought two points of error in his writ application:

FIRST POINT OF ERROR

(GERMANE TO FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR IN MOTION FOR REHEARING.)
THE COURT OF APPEALS ERRED IN HOLDING THAT ALCOA'S DUTY TO GIVEN AN ADEQUATE WARNING OF THE HAZARDS OF ITS CLOSURE SYSTEM DID NOT EXTEND TO CONSUMERS SUCH AS PLAINTIFF.

SECOND POINT OF ERROR

(GERMANE TO EIGHT THROUGH TENTH ASSIGNMENTS OF ERROR IN MOTION FOR REHEARING.)
THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT ALCOA'S BREACH OF ITS DUTY TO WARN CONSUMERS SUCH AS PLAINTIFF AND BOTTLERS SUCH AS J.F.W. WAS GROSS NEGLIGENCE AND IN NOT REINSTATING THE JURY'S FINDING OF PUNITIVE DAMAGES OF \$1,000,000 AGAINST ALCOA.

Clearly, neither of these points of error asserts that the court of appeals erred in its standard for reviewing the factual sufficiency of the evidence. The court, *sua sponte*, addresses its own point of error regarding the sufficiency of the evidence.

The court clearly violates the mandates of Tex.R.Civ.P. 476, which provides:

The consideration of the Supreme Court *shall be limited to questions of law raised by points in the application for writ of error* and to questions of law certified by a Court of Appeals.

Tex.R.Civ.P. 476 (Vernon 1986) (emphasis added). Caselaw further establishes that “[t]his court may consider only those questions of law raised by assignments of error in the application for writ of error . . . [and that] petitioner waives the right to complain of any holding to which no error is assigned.” *State Farm Mut. Auto Ins. Co. v. Cowley*, 468 S.W.2d 353, 354 (1971). This court is not authorized to reverse a lower court’s judgment in the absence of properly assigned error. *See State Bd. of Ins. of State of Texas v. Westland Film Indus.*, 705 S.W.2d 695 (Tex.1986); *Gulf Consolidated Int’l. Inc. v. Murphy*, 658 S.W.2d 565 (Tex.1983). The above rationale was applied in *Nat. Life & Accident Ins. Co. v. Blagg*, 438 S.W.2d 905, 909 (Tex.1969) where the court of appeals made a “no evidence” holding. We observed that “[s]ince this holding was not assigned as error in a motion for rehearing before the Court of Civil Appeals or in an application for writ of error before this court, it is final in Court of Civil Appeals, and we have no jurisdiction to review it.” *Id.*, at 566.

Alm asserted nineteen points of error in his motion for rehearing in the court of appeals. Points sixteen and seventeen complained of the court of appeals’ standard for review of the factual sufficiency of the evidence. An examination of Alm’s two points of error show that they are “germane” only to points one through five and points eight through ten in his motion for rehearing before the court of appeals. Rather than assert all of the points raised in his motion for rehearing, Alm chose to assert what he probably believed to be his two strongest arguments. Neither point of error complained of the standard applied by the court of appeals in its review of the factual

sufficiency of the evidence. The court argues a section of Alm's writ application, which appears after the "Conclusion" of Alm's second point of error, sufficiently presents a point of error in which it can bootstrap a sufficiency point. The section used by the court is entitled: "Plaintiff's Comments on the Court of Appeals Review of the Record." This section complains of such items as the court of appeals addressing Alm's expert witness as "Green," while addressing Alcoa's witness as "Dr." Block. The alleged arguments in this section, however, were clearly not listed under a point of error and cannot be considered by this court.

The court adopts a new approach in appellate review addressing arguments that have not been raised by points of error. Alcoa certainly did not have an opportunity to respond to the "incorrect standard" for factual sufficiency review arguments that were supposedly raised in this cause. This court is authorized to review errors in the judgment of the court of appeals, it is not authorized to create arguments on behalf of the parties.

For all of the above reasons, I dissent.

McGEE, J., joins this dissent.

APPENDIX D.

James E. ALM, Appellant
and Cross-Appellee,

No. C14-82-045-CV

vs.

ALUMINUM COMPANY OF AMERICA,
et al., Appellees and
Cross-Appellant.

Court of Appeals of Texas, Houston (14th Dist.).

Jan. 3, 1985

Rehearing Denied March 28, 1985.

Before JUNELL, MURPHY and SEARS, JJ.

OPINION.

MURPHY, Justice.

This products liability and negligence suit arose on June 3, 1976, when James E. Alm's eye was injured by a bottle cap which blew off a thirty-two ounce glass "7-Up" bottle. The trial court awarded Alm judgment for \$163,025 against Aluminum Company of America, (Alcoa). We reverse and remand this cause for new trial, because the evidence is factually insufficient to support the jury findings of negligence and proximate cause against Alcoa.

Alm brought suit against Aluminum Company of America, (the designer and licensor of the closure system), J.F.W. Enterprises, Inc. (the owner of the bottler in question) and Lewis & Coker Supermarkets, Inc. (the retailer which sold the bottle to Alm). Alcoa filed a cross-action against J.F.W. and Lewis & Coker. Alm settled with J.F.W. and Lewis & Coker prior to trial. The jury found that Alcoa and J.F.W. were negligent,

such negligence was the proximate cause of Alm's injury, and that Alcoa's negligence was 55 percent and J.F.W.'s negligence was 45 percent. The jury's answers to special issues relating to Alm's products liability action were disregarded by the trial court. No error was assigned on appeal concerning this action. Thus, the judgment is based upon Alm's negligence cause of action.

Alm purchased the bottle of "7-Up" from Lewis & Coker. Lewis & Coker purchased it from J.F.W. In turn J.F.W. had purchased the cap from W.H. Hutchinson & Son, Inc. (WHS). W.H.S. had entered into a licensing agreement with Alcoa, authorizing W.H.S. to manufacture resealable aluminum closures under an Alcoa patent. The capping machine used by J.F.W. to apply the cap to the bottle was designed by Alcoa. J.F.W. was authorized by the "7-Up" Company to package and sell "7-Up" products in Houston.

The packaging of the soft drink occurred in an assembly line process at Houston "7-Up" Bottling Company, owned and operated by J.F.W. A typical assembly process involves J.F.W. employees placing empty soft drink bottles onto a conveyor and feeding them into a filler machine which places soft drink syrup and carbonation in the glass bottles. From there the bottles go to the capping machine where an aluminum cap is placed on the bottles. Top pressure is then applied to the cap and bottle creating a top-side seal. Metal rolling tools contact the side of the cap and push the metal into the channels between the threads of the bottle. This procedure creates a custom seal between the individual cap and the bottle. The final product is then placed in a carton which is then delivered and sold by J.F.W. to Lewis & Coker and others for sale to the general public.

In points of error one through ten Alcoa asserts that the evidence is both legally and factually insufficient to support the jury's finding that Alcoa was negligent and that Alcoa's

negligence proximately caused Alm's injury. In considering legal insufficiency points of error the court will consider only the evidence tending to support the finding, viewing it in the most favorable light in support of the finding, giving effect to all reasonable inferences that may be drawn therefrom, and disregarding all conflicting evidence. If upon such review the court finds there is a complete absence of evidence of probative force to support the finding, or only a scintilla of evidence to support it, the point must be sustained. *Glover v. Texas General Indemnity Co.*, 619 S.W.2d 400 (Tex.1981); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965). In considering factual insufficiency points of error, the court examines the whole record to determine not only that there is some evidence to support the finding, but also to determine whether considering all the evidence, the finding is not manifestly unjust. If it is so weak that the finding is manifestly unjust, the court will sustain the point. *Burnett v. Motyka*, 610 S.W.2d 735 (Tex.1980); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1952).

Alm pled and attempted to prove four different negligent acts or omissions by Alcoa. The issue of negligence and proximate cause was broadly submitted. The issue inquired: Do you find that the negligence, if any, of any or all of the following parties proximately caused the occurrence made the basis of this suit: answer "yes" or "no" beside the name of each party listed:

Alcoa: _____

J.F.W.: _____

James E. Alm: _____

Thus, it is unknown which acts or omissions the jury determined to be negligent. It is therefore necessary to review the evidence concerning each of the four acts or omissions. The four alleged acts or omissions are that:

- (1) Alcoa negligently designed the bottle and cap in that the threads on the bottle to be impressed into the cap were too shallow;
- (2) Alcoa negligently designed the cap by including an optional pilfer-proof band on the cap;
- (3) Alcoa was negligent in recommending to bottlers a visual inspection system based upon the batch and hold principle of quality control, as opposed to inventing or devising some fail safe system of inspection for use by bottlers;
- (4) Alcoa was negligent in failing to adequately warn the bottler (JFW) and/or the plaintiff about the risk that an improperly applied cap could blow-off and cause personal injury.

We first address Alcoa's points of error which assert the evidence is legally insufficient to support the essential elements of Alm's negligence action against Alcoa. Negligence consists of three essential elements: 1) a legal duty owed by one person to another; 2) a breach of that duty; and 3) damage proximately resulting from that breach. *Colvin v. Red Steel Company*, 682 S.W.2d 243, 28 Tex.Sup.Ct.J. 153 (Dec. 15, 1984); *Abalos v. Oil Development Co.*, 544 S.W.2d 627, 631 (Tex.1976); *Coleman v. Hudson Gas and Oil Corp.*, 455 S.W.2d 701, 702 (Tex.1970). Moreover, the existence of a legal duty under given circumstances is a question of law for the court. See *Abalos v. Oil Development Co.*, *supra*, at 631; *Jackson v. Associated Developers of Lubbock*, 581 S.W.2d 208, 212 (Tex.Civ.App.Amarillo 1979, writ ref'd n.r.e.). The threshold question is whether Alcoa owed any duty to Alm of which one of the alleged acts or omissions would constitute a breach thereof. Alm asserts Alcoa owed the following duties to him: 1) to design its closure system in a non-negligent way so as to

avoid injury to third parties such as plaintiff; and 2) to warn plaintiff and/or J.F.W. of the danger that a misapplied bottle cap could blow off and injure a consumer.

Alcoa does not contest that it owed plaintiff a duty to design its closure system in a non-negligent way. We affirm the existence of that duty. It has long been held that a manufacturer has a duty to all whom he should expect to use the product to exercise reasonable care in the adoption of a safe plan or design. *Crawford Overhead Door Co. v. Addison*, 504 S.W.2d 587 (Tex.Civ.App.--Beaumont 1973, no writ); *Texas Bitulithic Co. v. Caterpillar Tractor Co.*, 357 S.W.2d 406 (Tex.Civ.App.--Dallas 1962 writ ref'd n.r.e.). Alcoa designed the cap which injured Alm and designed and manufactured the capping machine which applied the cap. However, Alcoa did not manufacture or sell the cap. The question arises whether the duty discussed above applies only to the manufacturer of the product that reaches the consumer. We hold that this duty also extends to designers of the product and its manufacturing process. There is no justification for restricting this duty to the manufacturer of the product that causes the injury. If someone's negligence proximately causes damages, it should be actionable regardless of the source, whether it be the manufacturer of the product, the designer of the product or the designer/manufacturer of the product's manufacturing process. We are not aware of any legal precedent in Texas for this holding, but it is consistent with authority in other states. In three cases, the Massachusetts Supreme Court affirmed the liability of designers of a product which caused injury, but which had no part in the manufacture of the product. They are: *McDonough v. Whalen*, 313 N.E.2d 435 (Mass.1974); *Bernier v. Boston Edison Co.*, 403 N.E.2d 391 (Mass.1980); and *Uloth v. City Tank Corp.*, 384 N.E.2d 1188 (Mass.1978). See also *Fabbrini Foods, Inc. v. United Canning*, 90 Mich.App. 80, 280 N.W.2d 877 (1979).

We reserve for later discussion whether Alcoa owed Alm and/or J.F.W. a duty to warn.

There is some evidence that Alcoa breached its duty to exercise reasonable care in the adoption of a safe design for its closure system. Alm's expert witness, George Greene, testified that under the Alcoa closure system there was no way that the bottler could have feasibly determined whether improperly capped bottles were going out of the plant. He testified that the sampling inspection procedure recommended by Alcoa was inadequate and that an average engineer would have designed into the closure system an inspection system that mechanically inspects the cap on every bottle.

Alcoa asserts that the standard of care applied to them must be determined at the time it was alleged to have been negligent and that this testimony is of no probative value because it was not limited to this time period. Alcoa is mistaken. The record shows that this testimony was properly limited to before June 3, 1976, the date of injury.

We next consider whether there is evidence that Alcoa's failure to provide a 100 percent or fail safe inspection method was the proximate cause of plaintiff's injury.

Proximate cause includes two essential elements: (1) foreseeability, and (2) cause in fact. *Missouri Pac. R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex.1977); *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 755 (Tex.1975); *East Texas Theaters, Inc. v. Rutledge*, 453 S.W.2d 466, 468 (Tex.1970). Both elements must be present, *Missouri Pac. R. Co. v. American Statesman*, *supra*, 103, and may be established by direct or circumstantial evidence. *Farley v. MM Cattle Co.*, *supra*, 755. Proximate cause cannot be established by mere guess or conjecture, but rather must be proved by evidence of probative

force. Foreseeability is satisfied by showing that the actor, as a person of ordinary intelligence, should have anticipated the danger to others by his negligent act. *Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex.1970). Cause in fact means that the act or omission was a substantial factor in bringing about the injury and without which no harm would have occurred. *Texas & P. Ry. Co. v. McCleery*, 418 S.W.2d 494, 497 (Tex.1967).

McClure v. Allied Stores of Texas, Inc., 608 S.W.2d 901, 903 (Tex.1980). George Greene testified that the failure to provide a 100 percent or fail safe inspection method was the cause in fact of plaintiff's injury. There was evidence that Alcoa knew that misapplied caps could blow off and cause serious injuries to consumers. From this the jury could reasonably infer that Alcoa could reasonably foresee that the failure to provide a 100 percent or fail safe inspection would create a danger to consumers.

We hold that there is some evidence that Alcoa breached its duty to Alm to design its closure system with reasonable care and that this breach was the proximate cause of Alm's injury. We overrule Alcoa's points of error relating to legal insufficiency of the evidence.

We now address Alcoa's points of error that assert the evidence is factually insufficient to support Alm's negligence action. The evidence relating to each of the four acts or omissions upon which Alm predicates his action will be discussed separately.

We find the evidence of Alcoa's failure to include a 100 percent or fail safe mechanical inspection system with its closure system was a failure to exercise reasonable care in the adoption of a safe design to be factually insufficient for several reasons. First, it is significant that at the time of trial, 1981,

a 100 percent or fail safe mechanical inspection method did not exist. This raises some question as to whether such a machine could be successfully built. Second, there is testimony that a visual inspection sampling system was more advantageous than a mechanical inspection method, because visual inspection gives the observer an indication of where to look for the cause of misapplication of the cap. Third, Dr. Robert Block testified that if a bottler followed Alcoa's recommended inspection system of taking samples, a bottler will discover all the weak caps before they are sent out. The basis for this conclusion is that sampling allows the inspector to discover when the machine begins to go out of adjustment because the capping machine is designed so that if it is going out of adjustment, it does so gradually. There is the additional testimony of Mr. George Overturf that the misapplication of a cap by the Alcoa machine will always be repetitive and for a problem of this nature a sampling inspection system is adequate.

George Greene testified contrary to the testimony of Dr. Block and Mr. Overiurf. He stated that misapplication of caps could have been intermittent, instead of continuous. In such a case periodic sampling may not discover a misapplied cap. However, there is substantial testimony that any temporary problem with the thread formation of the cap is not the kind of defect that is going to cause a blow-off. Thus, if Greene's testimony is accepted as true, evidence of proximate cause is still lacking.

We next consider whether the evidence is sufficient to support the theory that Alcoa was negligent in designing the thread depth of the bottle into which the cap was impressed. George Greene testified that the threads were not deep enough to facilitate visual inspection to determine the existence of weak threads. We need not determine whether the evidence is sufficient to find that the design of the thread depth was negligent, because Alm did not offer any probative evidence that the

thread depth of the bottle was the proximate cause of his injury. George Greene testified that the thread design was a cause of plaintiff's injury, but he gives no factual basis for this conclusion. The evidence overwhelmingly indicates that the cap which injured plaintiff was so badly misapplied that its misapplication is detectable by visual inspection even in the absence of deeper threads. Thus, deeper threads on the bottle which injured Alm would not have prevented the injury. The evidence is insufficient to establish proximate cause under this theory.

Alm also asserts that Alcoa was negligent in designing the cap with a pilfer-proof band on the cap. George Greene testified that the presence of the pilfer-proof band on the cap allows many caps with weak threads to reach consumers because caps with weak threads without the band would blow off immediately after they are bottled. He concluded that the pilfer-proof band made the bottle unreasonably dangerous to the consumer. However, the decision to include the pilfer-proof band did not ultimately rest with Alcoa. Alcoa designed caps both with and without pilfer-proof features. The choice of design rested with the soft drink companies and their bottlers. Assuming that the evidence is sufficient to show it is negligent to make caps with pilfer-proof bands, such negligence must be accounted to the party which made the ultimate decision to include the bands as part of the cap. Alcoa cannot be held responsible for the design decision of J.F.W.

Alm argues that because Alcoa did not warn bottlers about the dangers of a cap with a pilfer-proof band, J.F.W. did not have sufficient information to evaluate the risk of using a cap with a pilfer-proof band. Therefore, Alcoa should bear the responsibility for the unreasonable design because it chose to offer the pilfer-proof band as a design option without adequately warning J.F.W. of the risks of using a cap with a pilfer-proof band.

We find this argument unpersuasive because there is no evidence indicating that Alcoa was aware or that it was reasonably

foreseeable that the presence of a pilfer-proof band would increase the risk that a blow-off would occur in the hands of a consumer. Alcoa had no duty to warn J.F.W. of a risk that at the time of the design decision was unknown and not reasonably foreseeable. Even assuming that such a risk was reasonably foreseeable, J.F.W. should still bear the responsibility. Alcoa warned J.F.W. in an owner's manual that improper closure applications could result in a blowoff. Thus, Alcoa was in no better position than J.F.W. to anticipate this risk. In these circumstances it was the responsibility of J.F.W. to evaluate the potential risks created by the pilfer-proof band.

Alm's final contention is that the evidence is sufficient to show that Alcoa was negligent in failing to warn J.F.W. and/or Alm about the risk that an improperly applied cap could blow off and cause personal injury. We must first decide whether Alcoa owed a duty to warn. -

Alcoa was the designer/manufacturer of the capping machine which misapplied the cap that injured plaintiff. In *Crock̄er v. Winthrop Lab., Div. of Sterling Drug, Inc.*, 514 S.W.2d 429, 433 (Tex.Cr.App.1974) the court stated:

If the manufacturer knows or should know of potential harm to a user because of the nature of its product, the manufacturer must give an adequate warning.

Alcoa knew that the nature of the capping machine was that through use it would become out of adjustment thereby causing the misapplication of caps. Therefore Alcoa owed a duty to give an adequate warning to the bottler, J.F.W.

Alcoa contends that it did not create the risk of misapplied caps and therefore has no duty to warn. Alcoa relies on *Cactus Drilling Co. v. Williams*, 525 S.W.2d 902, 911 (Tex.Civ.App.--Amarillo 1975, writ ref'd n.r.e.), which held that one who did not create a dangerous situation has no duty

to warn another of the danger. Alcoa's position is that J.F.W. is solely responsible for creating the risk by its failure to properly maintain the capping machines. We consider this argument to be similar to a misuse defense which is common to product liability actions. It is essentially the argument that J.F.W. misused the machines by failing to properly maintain them. Alcoa cannot rely on this defense because it was aware of this possibility. If misuse of a product by a user is foreseeable by the manufacturer, then such misuse is no defense to an action based on the failure to warn of the risk created by the misuse. *Bituminous Casualty Corp. v. Black & Decker Manufacturing Co.*, 518 S.W.2d 868, 876 (Tex.Civ.App.--Dallas 1974, writ ref'd n.r.e.); *Bailey v. Boatland of Houston, Inc.*, 585 S.W.2d 805 (Tex.Civ.App.-- Houston [1st Dist.], aff'd on other grounds, 609 S.W.2d 743 (Tex.1980)).

We also believe that Alcoa had a non-negligent part in creating the risk of misapplied caps in that it created the potential for misapplied caps by designing and manufacturing a machine which through use becomes out of adjustment.

Alcoa further contends that it had no duty to warn because it did not manufacture the bottle, cap or contents of the product which injured Alm. One need not manufacture the product which causes injury for a duty to warn to arise. Alcoa's duty to warn arises because it designed and manufactured the capping machine which created the risk of misapplied caps, and was therefore a part of the manufacturing process of a potentially dangerous product. As stated earlier, a legal duty of care (including the duty to warn) extends to the manufacturer/designer of the product and to the designer/manufacturer of the manufacturing process of the product.

Alcoa's duty to give adequate warning, however, did not extend to Alm. Alcoa's duty to warn ended with J.F.W., which then had the duty to communicate the warning to consumers. This is because Alcoa had no control over the labeling of the

soft drinks. The bottler is the one possessing the adequate means to pass warnings on to consumers. A manufacturer is not liable for miscarriages in the communication process that are not attributable to his failure to give adequate warning. This may occur where an intermediate party is notified of the danger, or discovers it himself, and proceeds to deliberately ignore it and pass the product on without a warning. *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076, 1091 (5th Cir.1973); see *Jones v. Hittle Service, Inc.*, 549 P.2d 1383, 1394 (Kansas 1976).

We must determine whether there is sufficient evidence that Alcoa breached its duty to give adequate warning to J.F.W. The evidence shows that Alcoa supplied J.F.W. a 1970 owner's manual before Alm was injured with the warning:

Leakage or closure blow-off at lower pressures can occur when the closure application is improper . . .

Alm contends that this warning is inadequate because it does not contain the information that closure blow-off can result in serious personal injury. The question of the sufficiency of warning is a question of fact to be determined by the trier of the facts. *Muncy v. Magnolia Chemical Co.*, 437 S.W.2d 15, 20 (Tex.Civ.App.--Amarillo 1968, writ ref'd n.r.e.); *Bituminous Casualty Corp. v. Black & Decker Manufacturing Co.*, 518 S.W.2d 868, 873-74 (Tex.Civ.App.--Dallas 1974, writ ref'd n.r.e.). Because the issue of negligence was broadly submitted, there is no explicit jury finding that the warning was inadequate. However, there is an implied jury finding that the warning was adequate. The jury found J.F.W.'s negligence was a proximate cause of Alm's injury. Because foreseeability is an element of proximate cause, such a finding includes a finding that J.F.W. knew that its negligence could foreseeably result in Alm's injury. The jury impliedly found that J.F.W.

knew or should have known, because of the warning given by Alcoa, that a misapplied cap could result in personal injury. We therefore hold that the evidence is insufficient to show that Alcoa breached its duty to adequately warn J.F.W.

Having found that the evidence is factually insufficient to establish negligence and proximate cause under any theory, we reverse the judgment of the trial court and remand this cause for new trial. Our remand of this cause makes it unnecessary to review numerous other points of error raised by Alcoa and Alm.

ON MOTION FOR REHEARING

Appellant has raised issues in his motion for rehearing which require clarification and correction of the Court's opinion filed January 3, 1985.

In discussing whether Alcoa owed a duty to warn Alm, the opinion states, "The bottler is the one possessing the adequate means to pass warnings on to consumers." Alm contends that this statement is factually incorrect because the evidence shows that 7-Up, the parent soft drink corporation, has control over the beverage labels and not the bottler. Alm argues that Alcoa therefore owned a duty to warn 7-Up and that the evidence shows that Alcoa did not warn 7-Up.

Assuming that 7-Up controlled the labeling, we first point out that Alm as the plaintiff had the burden to prove that Alcoa breached its duty to warn 7-Up. The only evidence presented by Alm on this issue is the testimony of George Greene that as far as he knew, Alcoa had never given the warning to 7-Up. This testimony is of no value on this issue because Mr. Greene was not an employee or representative of either Alcoa or 7-Up and there was no evidence he was in a position to know what warnings Alcoa had given or not given 7-Up. Alm failed to carry his burden of proof on this issue.

Second, J.F.W. was licensed by 7-Up to package and sell its product. J.F.W. had the physical means to place a warning on the bottles. After J.F.W. received warning from Alcoa, it was incumbent on it as the licensee of 7-Up to communicate the warning to its parent company and attempt to obtain authorization to include the warning in the labeling. We hold that whatever duty Alcoa owed to warn 7-Up, it fulfilled by its warning to J.F.W.

Alm asserts that the court erred in holding that there is an implied jury finding that the warning to J.F.W. was adequate because this finding is contrary to the judgment of the trial court that Alcoa is liable. Alm cites *Lunsford v. Sage, Inc. of Dallas*, 438 S.W.2d 615, 618 (Tex.Civ.App.-- Houston [1st Dist.] 1969, writ ref'd n.r.e.) and *Life Insurance Co. of Southwest v. Nirs*, 512 S.W.2d 712, 717 (Tex.Civ.App.--San Antonio 1974, no writ) for the proposition that implied findings are only presumed in support of the judgment and not to defeat it.

First, the implied finding is necessary to and in support of the portion of the judgment holding J.F.W. liable. A finding that the warning was adequate is logically essential to the jury's conclusion that the negligence of J.F.W. proximately caused Alm's injury.

Second, the cases cited above by Alm apply Rule 279 of the Texas Rules of Civil Procedure which states that when issues are omitted to the jury, and there is no written finding made by the trial court on the omitted issues, then such omitted issues shall be deemed to be found by the court in support of the judgment. Rule 279 refers to implied findings by the trial court, and not to implied jury findings. Therefore, this court's implying of a jury finding from an express jury finding is not covered by Rule 279 and the cases applying it.

Appellant's Motion for Rehearing is overruled.

JUNELL, Justice, dissenting.

After considering Alm's motion for rehearing, I have become convinced that (1) this court was wrong in holding the evidence is factually insufficient to support the jury findings of negligence and proximate cause against Alcoa and (2) Alm's judgment against Alcoa should be affirmed.

In this court's opinion of January 3, 1985, we held that Alcoa had a duty to give an adequate warning but that such duty did not extend to Alm. We said Alcoa's duty to warn ended with J.F.W. and that J.F.W. then had the duty to communicate the warning to consumers such as Alm. Reasons given for that holding were: (1) Alcoa had no control over the labelling of the soft drinks and (2) the bottler is the one possessing adequate means to pass warnings on to consumers. However, as Alm points out in his motion for rehearing, there is evidence in the record that Alcoa could have effectuated a warning because of its control over the patents involved in the closure system and its licensing arrangements which were required for the system to be used. Alcoa could have required a warning to be placed on the beverage container. Alm also contends in his motion for rehearing that our statement that the bottler is the one possessing adequate means to pass warnings on to consumers is irrelevant in light of Alcoa's ability to warn and is factually incorrect because the undisputed evidence shows that the parent soft drink corporation, not the bottler, controls the beverage labels. I must agree with Alm concerning these contentions. This leads me to conclude that Alcoa's duty to warn extended to Alm and that the evidence is factually sufficient to support a jury finding that Alcoa was negligent in failing to warn Alm and such negligence was a proximate cause of the occurrence made the basis of Alm's suit. The presence of an intermediate party, the bottler, will not by itself relieve the seller of the duty to warn Alm. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1091 (5th Cir.1973).

I am also now convinced that there was a fact issue for the jury on the question of whether Alcoa negligently failed to give an adequate warning to J.F.W. and that we were wrong in holding there was an implied jury finding that the warning was adequate. The jury finding that J.F.W. was negligent and its negligence was a proximate cause of Alm's injuries do not necessarily imply a finding that Alcoa gave J.F.W. an adequate warning of the danger. Under the evidence in this case and the broad form of the special issue on negligence, I believe the jury finding of negligence on the part of Alcoa includes a finding that Alcoa's negligence was in its failure to give an adequate warning to J.F.W. On such issue, I think the evidence is sufficient to support such finding. Furthermore, I do not believe that the jury finding of negligence on the part of J.F.W. is necessarily predicated on an implied finding that Alcoa gave an adequate warning to J.F.W.

For the reasons stated, I disagree with the result reached by the majority, with the majority's opinion of January 3, 1985, and the majority's opinion on motion for rehearing. Therefore, I respectfully note my dissent.

APPENDIX E

NO. 1,101,479

JAMES E. ALM

VS.

**ALUMINUM COMPANY OF
AMERICA, ET AL**

§ **IN THE DISTRICT
COURT OF**

§ **HARRIS COUNTY,
TEXAS**

§ **129TH JUDICIAL DISTRICT**

J U D G M E N T

BE IT REMEMBERED that on the 31st day of August, 1981, came on to be heard on a jury trial setting the above entitled and numbered cause, wherein James E. Alm is Plaintiff, and Aluminum Company of America and J.F.W. Enterprises, Inc. are Defendants, and came all parties and announced ready for trial; and a jury consisting of James H. Coker, Foreman, and eleven (11) other jurors having been empaneled and duly sworn to try said cause, and said cause having proceeded from day to day and the jury having heard the evidence and argument of counsel, and having retired on September 17, 1981 to consider their verdict and having on September 18, 1981 returned into open Court their verdict consisting of the following answers to the Questions hereinafter set out:

"QUESTION 1

Did Alcoa either know or by the application of reasonably developed human skill could it have known while it supplied (prior to June 3, 1976) the closure system that

caps with weak threads were being produced by bottlers which could blow off carbonated soft drink bottles and injure consumers?

ANSWER: Yes

If you have answered Question No. 1 "Yes," and only in that event, then answer

QUESTION NO. 2

Did Alcoa fail to warn James Alm or J.F.W. of such danger to consumers?

James Alm: Yes

J.F.W.: Yes

If you have answered Question No. 2 "Yes" as to either James Alm or J.F.W., or both, and only in that event, then answer:

QUESTION NO. 3

Did the failure of Alcoa to warn James Alm or J.F.W., or both, of such danger to consumers render the closure system in question defective as marketed?

"Defective as marketed" means a condition of the product in question that renders it unreasonably dangerous. An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge of the community as to the product's characteristics. The duty to provide an adequate warning is not excused by the mere fact, if such is the case, that the adversely affected users of a product are few.

ANSWER: Yes

If you have answered Question No. 3 "Yes," and only in that event, then answer:

A77

QUESTION NO. 4

Was such failure to warn a producing cause of the occurrence in question?

ANSWER: Yes

QUESTION NO. 5

Was the closure system defectively designed at the time it was supplied by Alcoa?

A defectively designed closure system is a closure system that is unreasonably dangerous as designed, taking into consideration the utility of the closure system and the risk involved in its use. A manufacturer is not required to design a product to be the best that science can produce or to guarantee that no harm will befall the user. A closure system is not defectively designed if there has been substantial change in the configuration or operational characteristics of the product in a way that Defendant Alcoa could not have reasonably anticipated or expected in the normal and intended use of the product.

ANSWER: Yes

If you have answered Question 5 "Yes," and only in that event, then answer:

QUESTION 6

Was such defective design a producing cause of the occurrence in question?

ANSWER: Yes

QUESTION NO. 7

Do you find that the negligence, if any, of any or all of the following parties proximately caused the occurrence made the basis of this suit:

Answer "Yes" or "No" beside the name of each party listed:

Alcoa:	Yes
J.F.W.:	Yes
James E. Alm:	Yes

If you have answered Question No. 7 "Yes" as to more than one party, and only in that event, then answer:

QUESTION NO. 8

What percentage of the negligence that caused the injuries to James E. Alm do you find from a preponderance of the evidence to be attributable to each of the parties found by you to have been negligent?

Answer by stating the percentage, if any, opposite each name:

Alcoa:	55 %
J.F.W.:	45 %
James Alm:	0 %
	100%

QUESTION 9

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would be compensation for the reasonable expenses, if any, for necessary medical care which Jim Alm will, in reasonable probability, require in the future for treatment of his injuries resulting from the occurrence in question?

Answer in dollars and cents, if any.

ANSWER: \$3,000

In answering this question do not reduce the amounts in your answers because of the percentage of negligence, if any, of any party.

QUESTION NO. 10

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Jim Alm, for his injuries, if any, which you find from a preponderance of the evidence resulted from the occurrence in question?

You shall consider the following elements of damages, if any, and none other. Answer in dollars and cents, if any. In answering this question do not reduce the amounts in your answers because of the percentage of negligence, if any, of any party.

- | | |
|--|---------------|
| A. Physical pain and mental anguish in the past; | A. \$ 15,000 |
| B. Physical pain and mental anguish in the future; | B. \$ 100,000 |
| C. Physical impairment in the past; | C. \$ 15,000 |
| D. Physical impairment in the future; | D. \$ 100,000 |
| E. Loss of earning capacity in the past; | E. \$ 2,500 |
| F. Loss of earning capacity in the future. | F. \$ 70,000 |

QUESTION NO. 11

Was Alcoa grossly negligent with respect to the closure system and was such gross negligence a proximate cause of the occurrence in question?

By the term "grossly negligent" as used in this Question, is meant that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it.

ANSWER: Yes

If you have answered Question 11 "Yes", and only in that event, then answer Question 12.

QUESTION 12

What sum of money, if any, do you find from a preponderance of the evidence that Jim Alm should be awarded against Alcoa as exemplary damages?

In answering this Question, you are instructed that "exemplary damages" means an amount which you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that may have been found by you as actual damages.

Answer in dollars and cents, if any.

ANSWER: \$1,000,000.00

In answering this question do not reduce the amounts in your answers because of the percentage of negligence, if any, of any party."

After the verdict of Jury was received in open Court and after the Jury had been asked if such was its verdict, and the foreman of the Jury, Mr. James H. Coker, and nine (9) other jurors having signed the verdict and indicated to the Court that such was the verdict of ten (10) members of the Jury, the Court accepted the Jury's verdict and ordered the same to be filed herein as the verdict of the Jury in this cause and the Jury was then discharged; and the Court, having later considered the Motion For Judgment Notwithstanding The Verdict, Or, In The Alternative, Motion To Disregard Jury Findings filed by Defendant, Aluminum Company of America, and having decided that said Motion should be granted in part, the Court disregarded and set aside the Jury's answers to Questions Numbers 1 through 6 because the Court found that strict products liability does not apply to Defendant, Aluminum Company of America, and the Court further disregarded and set aside

the Jury's answers to Questions Numbers 11 and 12 because the Court finds that, while there is some evidence to support such answers of the Jury, such answers to Questions Numbers 11 and 12 are against the great weight and overwhelming preponderance of the evidence; and, having disregarded and set aside the Jury's answers to Questions Numbers 1 through 6 and the Jury's finding to Questions Numbers 11 and 12, the Court enters judgment on the remainder of the Jury's answers which have not been disregarded and set aside by the Court; therefore it is

ORDERED, ADJUDGED and DECREED by the Court that the Defendant, Aluminum Company of America is granted a credit of FIVE THOUSAND DOLLARS (\$5,000.00), previously paid the Defendant, Lewis & Coker Supermarkets, Inc., in settlement to Plaintiff, James E. Alm, before trial and it is further

ORDERED, ADJUDGED and DECREED by the Court that the Plaintiff, James E. Alm, do have and recover from Defendant, Aluminum Company of America, the sum of ONE HUNDRED SIXTY THREE THOUSAND TWENTY-FIVE DOLLARS (\$163,025.00) together with interest thereon at the rate of NINE PERCENT (9%) per annum from this date until paid; and it is further

ORDERED, ADJUDGED and DECREED by the Court that the Plaintiff, James E. Alm, do have and recover from the Defendant, J.F.W. Enterprises, Inc., the sum of ONE HUNDRED THIRTY SEVEN THOUSAND FOUR HUNDRED SEVENTY FIVE DOLLARS (\$137,475.00), together with interest thereon at the rate of NINE PERCENT (9%) per annum from this date until paid; and it is further

ORDERED, ADJUDGED and DECREED that the Cross-Action filed by Defendant, Aluminum Company of America, against Defendant, Lewis & Coker Supermarkets, Inc., for contribution and indemnity is in all things denied; and it is further

ORDERED, ADJUDGED and DECREED that the Cross-Action filed by Defendant, J.F.W. Enterprises, Inc., for contribution and indemnity against Defendant, Lewis & Coker Supermarkets, Inc. is in all things denied; and it is further

ORDERED, ADJUDGED and DECREED that the Cross-Action filed by Defendant, Lewis & Coker Supermarkets, Inc., for contribution and indemnity against Defendant, Aluminum Company of America, is in all things denied; and it is further

ORDERED, ADJUDGED and DECREED that the Cross-Action filed by Defendant, Lewis & Coker Supermarkets, Inc., against Defendant, J.F.W. Enterprises, Inc., for contribution and indemnity is in all things denied; and it is further

ORDERED, ADJUDGED and DECREED that the Cross-Action filed by Defendant, Aluminum Company of America, against Defendant, J.F.W. Enterprises, Inc., for contribution and indemnity is in all things denied; and it is further

ORDERED, ADJUDGED and DECREED that the Cross-Action filed by Defendant, J.F.W. enterprises, Inc., against Defendant, Aluminum Company of America, for contribution and indemnity is in all things denied; and it is further

ORDERED, ADJUDGED and DECREED that all costs of Court herein are taxed one-half ($\frac{1}{2}$) against Defendant, Aluminum Company of America, and one-half ($\frac{1}{2}$) against Defendant, J.F.W. Enterprises, Inc., for which execution may issue if same are not timely paid in due course.

The Court further takes notice of the fact that an Agreement was entered into between the Plaintiff, James E. Alm and Defendant, J.F.W. Enterprises, Inc., prior to trial, a copy of said Agreement was introduced into evidence during the trial and that said Agreement reads, in part, as follows:

"1. The sum of \$90,000.00 will be paid to James E. Alm on behalf of J.F.W. Enterprises, Inc. upon the entry of a final judgment in this cause by the District Court of

Harris County, Texas. The parties recognize that such payment is not in any way intended to be a full and complete payment of all of the legal damages which Mr. Alm has suffered. James E. Alm agrees that J.F.W. Enterprises, Inc.'s liability in this matter as a result of the injuries to James E. Alm shall never exceed the sum of \$90,000.00 and he hereby agrees to indemnify and hold harmless J.F.W. Enterprises, Inc. from any liability of any kind or character to any other party seeking contribution or indemnity for any sum over \$90,000.00. It is the intent of this agreements that J.F.W. Enterprises, Inc. shall not, under any circumstances, have to pay anyone as a result of the injuries of James E. Alm other than the \$90,000.00 referred to herein.

2. James E. Alm contends that his actual losses and damages are at least \$526,000.00. By entering into this agreement, he is not releasing any causes of action which he may have against any other persons, firms or parties to this litigation. He specifically reserves his causes of action against Aluminum Company of America and Lewis & Coker Super Markets, Inc.

3. James E. Alm agrees that the \$90,000.00 to be paid pursuant to this Agreement shall be reimbursed to J.F.W. Enterprises, Inc. out of any net recovery which he effects from the various other defendants in this cause, to be calculated as follows:

(a) 40% of any sum between \$100,000.00 and \$150,000.00 to be paid over to J.F.W. Enterprises, Inc.; and

(b) 50% of any sum in excess of \$150,000.00 to be paid over to J.F.W. Enterprises, Inc.

Such net recovery by James E. Alm from the other defendants in this cause shall be determined by the final court decision concerning the damages to be paid by any such

defendant to James E. Alm, whether such final decision is by final judgment of the Trial Court entered herein based upon the Jury's determination of liability and damages or upon the judgment of the highest appellate Court in this State to which appeal, if any, is taken."

All relief sought herein by any of the parties hereto which is not expressly granted in this Judgment is hereby denied.

DONE, SIGNED and ENTERED this ____ day of _____, 1981, at Houston, Harris County, Texas.

HON. THOMAS J. STOVALL,
JUDGE PRESIDING

APPROVED AS TO FORM ONLY
AND NOT AS TO SUBSTANCE:

SCHMIDT & MATTHEWS, P.C.

BY: _____

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A86

APPENDIX F

SUPREME COURT OF TEXAS

P.O. Box 12248

Supreme Court Building

Austin, Texas 78711

John T. Adams, Clerk

April 4, 1990

Mr. Michael Connolly
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Mr. Robert M. Roach, Jr.
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Mr. Timothy F. Lee
Schmidt & Matthews, P.C.
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Houston TX 77002

RE: Case No. C-7889

STYLE: ALUMINUM COMPANY OF AMERICA
v. JAMES E. ALM

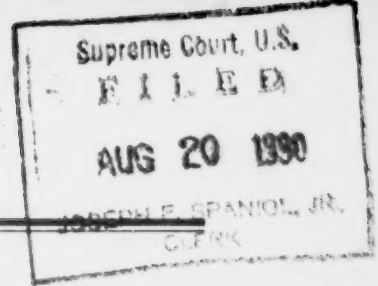
Dear Counsel:

Today, the Supreme Court of Texas overruled the motion
for rehearing in the above referenced cause.

Respectfully yours,

John T. Adams, Clerk

By _____
Deputy



NO. 90-52

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALUMINUM COMPANY OF AMERICA,
Petitioner,

v.

JAMES E. ALM,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 90-52

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALUMINUM COMPANY OF AMERICA,
Petitioner,

v.

JAMES E. ALM,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS**

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. § 1257(a). Petitioner's constitutional claims were not pressed or passed upon below and are raised here for the first time. The Court therefore lacks jurisdiction because it is prevented from deciding federal constitutional claims not raised below. *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). If the Court decides that its "not pressed or passed upon" rule is merely prudential and not jurisdictional, it should still decline to review petitioner's claims as it has done in other recent decisions where constitutional attacks, which had not been raised in the lower courts, were made on punitive damages awards. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2921

(1989); *Bankers Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1649-51 (1988).

STATEMENT OF THE CASE

A. Statement of Facts

This case involves one of at least 507 claims and lawsuits¹ filed against petitioner Alcoa as a result of serious injuries caused by an aluminum bottle cap designed by and produced under agreements with Alcoa. In each of these cases a consumer was injured when a twist-off bottle cap exploded off a soft-drink bottle. Due to design defects resulting in misapplication of the cap, aluminum bottle caps with "weak threads" will "blow off" of bottles with great force, like the cork of a champagne bottle, rather than releasing the pressurized gas gradually and safely. If one of these exploding caps hits a consumer's eye, a very serious injury will result. For more than a decade—until long after respondent Alm was injured—Alcoa steadfastly opposed warning consumers about the dangers of its closure system. Finally in the late 1980's, warnings began to appear on bottles using the Alcoa closure system and other caps:

1. The figure of 507 bottle cap blow-off claims and lawsuits between 1967 and 1987 comes from a list produced in another bottle cap blow-off case which respondent's counsel handled. The list was produced during the deposition of Bing Welch, Alcoa's Senior Packaging Engineer. Deposition of Bing Welch, 56-57, taken on January 5, 1987 in *Morcl v. Aluminum Co. of America*, No. 83-17268 (165th Dist. Ct., Harris County, Texas.). This figure of 507 lawsuits was a substantial increase from the number demonstrated in the *Alm* case of 127 claims and lawsuits from 1967 through 1975. In yet another bottle cap blow-off case against Alcoa, the evidence showed that by 1979, 229 consumers had been injured by the Alcoa closure system. See *Sliman v. Aluminum Co. of America*, 112 Idaho 277, 731 P.2d 1267, 1269 (1986). After the Idaho Supreme Court affirmed a jury award of punitive damages against Alcoa, this Court denied Alcoa's petition for writ of certiorari in *Sliman v. Aluminum Co. of America v. Sliman*, 486 U.S. 1031 (1988) (No. 86-1569).



Soft Drink Label With Warning
(Bottle purchased in 1987.)

This warning is almost identical to the product warning suggested by respondent's expert at trial, S.F. 554.

At the time when respondent was injured, however, the product which caused his injury had no such warning.

More than 14 years ago, on June 3, 1976, respondent James Alm was hit in the right eye by an aluminum twist-off bottle cap which blew off of a Seven-Up bottle Mr. Alm was trying to open.² Respondent lost most of the vision in his eye when it was struck by the cap. The bottle cap was part of a soft drink closure system which Alcoa had designed, patented, and marketed to the soft drink industry.³ Alcoa had also designed and manufactured the machine which applied the cap.⁴ The bottling machine in question had been sold by Alcoa to J.F.W., a Houston, Texas firm. J.F.W., using the Alcoa capping machine and cap, bottled and assembled the product which injured respondent and sold it under the trade name "Seven-Up". The Seven-Up Company itself had no direct role in the production of the soda or the capping of the bottle, but had franchised J.F.W. to produce the soft drink bearing its trademark. The Seven-Up Company was not in the chain of distribution of the cap, the bottle or the capping machine and was not a party to this lawsuit.

Alcoa knew of the hazard of consumer injury from the time the closure system was first developed.⁵ In 1970, an

2. *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 590 (Tex. 1986), Appendix C to the petition for writ of certiorari at A33. (Hereinafter, the first Texas Supreme Court decision in this case will be referred to as "*Alm I.*" The second Texas Supreme Court opinion will be referred to as "*Alm II.*" Since all four Texas appellate court opinions are reprinted in the appendices to the Petition for Writ of Certiorari, references will be to the page number of the appendices, i.e., Pet. App. at A33.)

3. *Alm I.*, Pet. App. at A33.

4. *Alm II.*, Pet. App. at A3.

5. Testimony of George Overturf, Alcoa's Manager of Closure

Alcoa employee conducted a study of the Alcoa closure system and concluded that “[f]aulty performance can cause serious injury to a would-be consumer if the closure blows off. . . .”⁶ By 1975, there had been at least 127 other claims and lawsuits filed against Alcoa involving the Alcoa closure system⁷ and Alcoa was already defending thirty-four other personal injury lawsuits involving eye injuries from blow-offs of its bottle caps.⁸

Alcoa’s Manager of Closure Technology acknowledged that between 1967 and 1975 the number of lawsuits and the frequency of the lawsuits per closure sold had both been steadily increasing.⁹ That official testified that there would “certainly” have to be more than the one hundred

Technology: “Oh, we have always known that if a cap is improperly applied that it can blow off and injure someone.” S.F. 435. (References to the reporter’s transcript of the testimony, referred to as the statement of facts in Texas practice, will be abbreviated “S.F.” followed by a page number.)

6. “Blow-Off Performance of the 28 TSPP Closure,” Jaye Gibbs, Plaintiff’s Exhibit No. 9.

7. Testimony of George Overturf:

Q. (Mr. Matthews): How many claims and lawsuits do you claim to have, Mr. Overturf?

A. (Mr. Overturf): There were 100, approximately 125 through 1975.

Q: What year did that begin with?

A: From the beginning of the sale of the closures, in 1967.

Q: So from 1967 to when?

A: Through 1975.

Q: Through 1975. Mr. Overturf says—how many?

A: 127.

S.F. 261-262.

8. *Alm II*, Pet. App. at A6.

9. *Alm v. Aluminum Co. of America*, 753 S.W.2d 478, 482 (Tex. App.—Houston [14th Dist.] 1988); Pet. App. at A20.

and twenty-seven injuries before Alcoa would treat the problem as important enough to warrant warning consumers about the risk-involved.¹⁰ Alcoa had a substantial financial stake in the closure system, primarily because of the market it created for literally billions of bottle caps to be produced out of its most significant product, aluminum.¹¹ Alcoa may have believed that this market would be harmed if consumer warnings decreased acceptance of the closure system by consumers and bottlers. *See Appendix A at 2a.*

Respondent's primary theory against Alcoa at trial and on appeal was that Alcoa negligently failed to warn the ultimate consumer, i.e., the purchaser of the soft drink, of the hazard of personal injury from bottle-cap blow-off. There was substantial evidence in this case that Alcoa, had it wished to do so, could have caused a warning to consumers to be placed on the product which was involved in Mr. Alm's injury. A patent and licensing expert

10. Testimony of George Overturf:

Q (Mr. Matthews): What number of injuries would have to occur in order for Alcoa to feel, or for you to determine, that a warning should be given to the public?

A (Mr. Overturf): I wouldn't want to make an estimate about that. Really, I don't know.

Q: Would it have to be a higher number than 127 between 1965 and 1967 and 1975?

A: I would say, certainly, yes.

Q: It would have to be, say—would 500 do it?

A: I wouldn't want to make a guess like that, Mr. Matthews. S.F. 269-270. The jury may have concluded that 127 claims and lawsuits from blow-offs were only the "tip of the iceberg" since Mr. Overturf refused to produce the relevant Alcoa documents concerning claims and lawsuits filed against Alcoa during trial. S.F. 232-38; 464, 1422-23.

11. S.F. 1147-1148.

testified that because of Alcoa's control of the patents and licenses over its closure system, Alcoa could have required J.F.W. to put a warning on the soft drink bottle.¹² At trial, Alcoa consistently took the position that no warning of this hazard was necessary or should be given to the consumer. Prior to respondent's injury in 1976, Alcoa did not intend for consumers to be warned of this hazard—either by itself or by any other entity and Alcoa knew that no such warnings were being given.¹³

12. Testimony of David Groves, plaintiff's patent and licensing/warnings expert:

Q (Mr. Matthews): I want to ask you, sir, from your knowledge and experience, and having examined all of these patents and licensing arrangements, do you have an opinion as to a way by which Alcoa could in fact control the placement of a warning on this product?

A (Mr. Groves): Yes, sir.

Q: And what is that opinion?

.

A: They most certainly could have required notices to be placed on the product.

Q: All right, sir. Explain, if you would, sir, how that could come about.

A: Okay. It would be very simple. At the time of any of these three licensing agreements, they simply could have had another paragraph in there stating that the licensee shall require all of those to whom it sells to place a notice on the container.

It wouldn't have to be that specific. It could say "On the container," or it could say "On any kind of product that the container may be marketed by."

They could require a notice and a certain minimum size, like letters one-inch high, certain point size, anything that makes it visible to the ultimate-end consumer.

They could require the licensee to agree to require everybody that buys from him to put that notice on there.

S.F. 998-1000.

13. Testimony concerning Alcoa's mental attitude concerning consumer warnings about this hazard is collected in Appendix A.

Despite a growing number of serious injuries, Alcoa never warned the Houston bottler, J.F.W., that the Alcoa-made bottling machine and closure system which J.F.W. was using could produce dangerous products. J.F.W.'s plant superintendent testified that Alcoa never told him of "any hazard associated with caps blowing off."¹⁴ Alcoa asserts that it provided bottlers with wall charts, a slide show presentation, and "various other written communications" dealing with the hazard. Petition at 4. In fact, however, none of these materials ever reached J.F.W.¹⁵ The Alcoa technical service representative who dealt with J.F.W. never told J.F.W. or any other bottler in his 6 state area of the danger of blow-offs because Alcoa officials never disclosed that growing problem to their own field representative.¹⁶ The Texas Supreme Court con-

14. Testimony of Charles Ferro, J.F.W.'s plant superintendent:

Q (Mr. Marshall): I think you told Mr. Connelly . . . that you were not aware in 1976 of any hazard associated with caps blowing off; is that right?

A (Mr. Ferro): I never heard of any.

Q: Alcoa never told you of any?

A: No, sir.

S.F. 1540-1541.

15. Testimony of Charles Ferro:

Q (Mr. Marshall): In fact, Mr. Ferro, the first time you ever saw a copy of that brochure was when I showed you one, wasn't it?

A (Mr. Ferro): Yes, sir.

S.F. 1542.

16. Testimony of Richard Condra, Alcoa's Technical Service Representative:

Q (Mr. Marshall): Did you tell [the J.F.W. employee whom Mr. Condra instructed in the operation of the Alcoa capping machine] that Alcoa at that time was aware that people were getting injured across the country from cap blow-offs?

cluded that "[t]he undisputed evidence shows that at the time of Alm's injury in 1976, Alcoa was acutely aware of the danger of cap blow off, but there is no evidence that it did anything to warn J.F.W. or the purchasers of J.F.W.'s products about the very real nature of this danger."¹⁷

The jury found that both Alcoa and the soft drink bottler, J.F.W., were negligent. The jury also concluded that Alcoa was grossly negligent. The jury awarded actual damages of \$305,000 and punitive damages against Alcoa in the amount of \$1,000,000. Petitioner no longer contests the finding of negligence or the award of compensatory damages. Only the findings of gross negligence and resulting punitive damages findings are at issue before this Court.

B. Procedural History

Under Texas law, a jury may award punitive damages if a tort defendant is found guilty of gross negligence.¹⁸

A (Mr. Condra): No. I didn't know that.

Q: You weren't aware of that?

A: No.

Q: Alcoa never told you that?

A: No.

S.F. 1702.

Q (Mr. Matthews): If you didn't know anything about the number of injuries being caused across the country from the cap blow-offs, I guess there was no way to say anything about that, top, side or bottom, was there?

A (Mr. Condra): No. I didn't know about it.

S.F. 1705.

17. *Alm II*, Pet. App. at A7.

18. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981).

The verdict form submitted to the jury in this case defined gross negligence as "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it."¹⁹ Despite oral and written objections to the charge at trial, Alcoa did not make the objections that it makes to this Court regarding the punitive damages instruction and special verdict question. Indeed, Alcoa's trial counsel was in effect the co-author of the very instruction to which Alcoa's appellate counsel now objects.

After the trial, Alcoa moved for a new trial and for judgment notwithstanding the jury's verdict, but did not raise any objections concerning alleged constitutional violations. The trial court set aside the findings of gross negligence and the punitive damages award.²⁰

Both respondent and Alcoa appealed. In this case's first appearance before the Texas Court of Appeals, Alcoa attacked the negligence and actual damages findings, and respondent sought reinstatement of the gross negligence and punitive damages findings. The Court of Appeals held that Alcoa did not have a duty to warn the purchaser of the soft drink. The intermediate court remanded the case for a new trial.²¹

Respondent Alm appealed the decision of the Court of Appeals to the Texas Supreme Court. In the Texas Supreme Court, respondent argued that the lower court had erred in holding that Alcoa had no duty to warn

19. Charge of the Court, Question 11, Pet. App. at A79.

20. *Alm II*, Pet. App. at A42-A43.

21. *Alm v. Aluminum Co. of America*, 687 S.W.2d 374, 382 (Tex. App.—Houston [14th Dist.] 1985), Pet. App. at A68-A71.

the ultimate consumer. Respondent also asked for a reinstatement of the gross negligence and punitive damages findings. Although supporting the decision of the Court of Appeals on other grounds, Alcoa again failed to object on constitutional grounds to the jury instructions or special verdict questions regarding gross negligence and punitive damages. Alcoa also advanced no challenge to the amount of punitive damages.

In a seven-two decision, the Texas Supreme Court reversed the Court of Appeals, holding that Alcoa indeed had a duty to warn consumers of the hazard of bottle cap blow-offs, and reinstated the jury's findings of gross negligence.²² The Supreme Court remanded to the Court of Appeals for further review on several issues, including the sufficiency of the evidence supporting the gross negligence findings.

On remand, the Court of Appeals affirmed the jury's verdict on ordinary negligence and actual damages; it reversed and remanded for new trial the jury findings of gross negligence and punitive damages.²³ After the second opinion of the Court of Appeals, both respondent and Alcoa again sought review by the Texas Supreme Court.

In *Alm II*, the Texas Supreme Court rejected Alcoa's attacks on the ordinary negligence and actual damages found by the jury. The Court also held that the "evi-

22. *Alm I*, Pet. App. at A35-A38, A42-A43.

23. The Court of Appeals held that the gross negligence findings were supported by evidence which was "factually insufficient". This is a term of art in the Texas practice for one of two standards of evidentiary review. In spite of Alcoa's protest to the contrary, a holding of this nature can be reversed by the Texas Supreme Court if that court holds that the jury finding is supported by all of the evidence, which is referred to in Texas as a finding established "as a matter of law." *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989).

dence shows conclusively that Alcoa was consciously indifferent about the possibility of bottle cap blow-off," and affirmed the gross negligence and punitive damages award.²⁴ The Texas Supreme Court concluded that Alcoa could not discharge its duty to warn the ultimate consumer through conduct directed toward Seven-Up.²⁵ Since Alcoa had warned neither J.F.W. nor consumers, the Texas Supreme Court concluded that "there is no evidence in the record to negate the jury's finding of gross negligence."²⁶ In the Supreme Court, Alcoa did not raise, and the court thus did not address, any objection regarding the size of the punitive damage award. Justice Gonzalez, a prolific writer of exceptionally strong-worded and colorful dissents,²⁷ dissented in *Alm II* as he had in *Alm I*.

24. *Alm II*, Pet. App. at A6.

25. Petitioner suggests that the Texas Supreme Court's rulings concerning the Seven-Up evidence were "unforeseeable" and "surprised everyone." Petition at 15 & 6, n.3. In fact, the court relied upon § 388 of the Restatement (Second) of Torts (1965), long an established part of Texas tort law. Pet. App. at A5. Since Seven-Up was not in the chain of distribution of the cap, the bottle or the capping machine, the court held that it was not an appropriate intermediary for Alcoa to warn in order to satisfy its duty to warn consumers. This is a particularly reasonable conclusion in the instant case, where the evidence showed that Alcoa could have caused a warning to be placed on the product had it attempted to do so with its customers who were in the chain of distribution, but had no such control over the Seven-Up Company. See note 12.

26. *Id.*, Pet. App. at A7.

27. Alcoa relies upon Justice Gonzalez's dissent in a number of places. In order to put the matter in an appropriate context, it is only fair to observe that Justice Gonzalez expresses himself in flamboyant terms. See, *inter alia*, the following Gonzalez dissents from the last two terms: *Amarillo Oil Co. v. Energy-Agri Products, Inc.*, 33 Tex. Sup. Ct. J. 623, 629 (June 27, 1990) (Majority's opinion will create "chaos."); *Dow Chem. Co. v. Aljaro*, 786 S.W.2d 674, 690 (Tex. 1990) (Opinion makes Texas "an irresistible forum for all mass disaster lawsuits."); *Florc v. Fourth Ct. of Appeals*, 777 S.W.2d 38, 44 (Tex. 1989) (Opinion requires litigants and

REASONS FOR DENYING THE WRIT

(1) The first question raised by the petition is whether the jury instruction regarding punitive damages in this case was unconstitutional because it did not establish a sufficiently specific standard regarding liability for, or the amount of, punitive damages that might be awarded. Petitioner urges that its constitutional argument is related to one of the issues now before the Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), *cert. granted*, 110 S.Ct. 1780 (1990) (No. 89-1279). Although petitioner presents three constitutional arguments, this is the only one which supports petitioner's claim that this case should be held pending this Court's determination of *Haslip*. The fatal defect in this contention is that petition never presented this constitutional claim to the Texas courts. Under 28 U.S.C. § 1257, this Court has consistently required that a petitioner's claims be presented to the courts below. *Bankers Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1651 (1988); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

When the trial judge in this case indicated his intent to give the instruction to the jury²⁸ regarding punitive

judges "to accomplish the impossible."); *Southern States Transp. Inc. v. Texas*, 774 S.W.2d 639, 643 (Tex. 1989) ("[S]ubterfuge or legal mumbo jumbo. . ."); *Jilani v. Jilani*, 767 S.W.2d 671, 679 (Tex. 1988) (Opinion makes judicial system "a forum for a spectacle. . ."); *Lujan v. Houston Gen. Ins. Co.*, 756 S.W.2d 295, 299 (Tex. 1988) (Opinion "has great potential for mischief."); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 138 (Tex. 1988) ("[T]he majority has had to resort to a tortured reading. . ."); *Lundsford v. Morris*, 746 S.W.2d 471, 474 (Tex. 1988) ("[P]reposterous. . .").

28. The jury instructions, as is the normal Texas practice, were contained in part in the Questions, or special verdict forms, submitted to the jury. The gross negligence and punitive damages issues were submitted as Questions 11 and 12. Pet. App. A79-A80.

damages, Alcoa's trial counsel made non-constitutional objections to which the trial court acceded.²⁹ Alcoa's trial counsel then did not object further to the final wording of the jury charge. Under Texas procedure, the lack of a contemporaneous objection is an absolute bar to any subsequent challenge to a jury instruction. Tex. R. Civ. P. Ann. r. 272, 274 (Vernon Supp. 1990). Rule 274 of the Texas Rules of Civil Procedure provides explicitly:

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.

Texas courts have consistently and strictly enforced this contemporaneous objection requirement.³⁰ This Court has held that failure to comply with a state procedural rule will result in the waiver of federal questions. *Williams v. Georgia*, 349 U.S. 375, 382-83 & n.6 (1955).

29. Petitioner, in commenting on the first draft of the trial court's proposed charge, asked that the instruction in Question 11 utilize the language from *Burk Royalty v. Walls*, 616 S.W.2d 911, 921 (Tex. 1981), which refers to conscious indifference "to the rights or welfare of the person or persons to be affected by it." Defendant's Objections to the Charge have been attached as Appendix B at 3a. The trial court then reworded the instruction to read exactly as petitioner had requested. See Petition at 4, n.2. The objections refer to Questions 12 and 13 but the trial court re-numbered them to Questions 11 and 12.

30. *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986) ("The purpose of Rule 274 is to afford trial courts an opportunity to correct errors in the charge, by requiring objections both to clearly designate the error and to explain the grounds for complaint. An objection which does not meet both requirements . . . does not preserve error on appeal." (citations omitted)); *Missouri Pacific R.R. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973) ("One of the main purposes of Rule 272 is to enable the trial court to submit a proper charge to the jury and to have the prior benefit of counsel's objections so as to correct any errors that might otherwise occur.").

During the nine years following the jury verdict, petitioner filed in the Texas appellate courts a total of 18 briefs totalling 436 pages. Not once in those briefs did petitioner assert that the jury instruction violated the federal constitution. In fact, in a 1987 brief filed by Alcoa, petitioner commended the instruction.³¹ At no time were the Texas courts asked to, or afforded an opportunity to, consider any constitutional objection with regard to the instruction at issue. The courts below were never called upon to, and never did, decide any question related to *Haslip*.

The lack of a contemporaneous objection is particularly significant because, had an objection been made, the jury instruction might have been framed differently. Texas requires reasonable proportionality between compensatory and punitive damages and has established factors for evaluating the reasonableness of punitive damage awards.³² Petitioner could have requested a more specific jury instruction had it chosen to do so. Having deliberately

31. "The charge to the jury on gross negligence is the very one approved in the *Burk* [*Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981)] case." Reply Brief to Application for Writ of Error, 39, No. C-4093.

32. Texas courts have long held that the amount of punitive damages must be reasonably related to the amount of compensatory damages, a standard which prevents the award of excessive punitive damages. *Tynberg v. Cohen*, 76 Tex. 409, 13 S.W. 315, 316-17 (1890). Additionally, the Texas courts have established six factors for evaluating punitive awards, which further protect defendants from excessive punitive damages. *Alamo Nat. Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). Both the trial courts and the courts of appeals have supervisory jurisdiction over the amounts of Texas punitive damage awards. See *Ford Motor Co. v. Durrill*, 714 S.W.2d 329, 346-47 (Tex. App.—1986), *vacated upon settlement*, 754 S.W.2d 646 (Tex. 1988). (The amount of punitive damages was reduced by the trial court and court of appeals to only 10% of the jury award.)

chosen not to request that the jury be given a more specific instruction with regard to punitive damages, petitioner cannot now complain that such an instruction was not given.

The other questions before the Court in *Haslip* are not presented by the circumstances of this case. Petitioner in *Haslip* apparently raised its constitutional objections at every point at which the Alabama legal system requires an objection be made.³³ In this case, the petitioner has wholly failed to raise any constitutional objection to the punitive damage instruction before the Texas courts at any point. Arguably, in *Haslip* the award of punitive damages may be as much as 250 times the award of actual damages sustained by the plaintiff in that case.³⁴ In the instant case, the punitive award was only three times the compensatory damages.³⁵ Moreover, petitioner in this case does not contend that either the punitive award or the underlying compensatory award were excessive. Finally, Petitioner does not contend that any of the other issues in *Haslip*—such as whether a punitive damage award can be based on respondeat superior—are in any way presented by this case.

Petitioner also suggests that this case would be an appropriate vehicle for resolving constitutional questions

33. While the briefs in *Haslip* are not particularly clear on this point, the respondent in *Haslip* does not seem to argue that the petitioner failed to satisfy state law in the presentation of the constitutional questions.

34. See Brief of petitioner at 10-11, *Pacific Mutual Life Ins. Co. v. Haslip* (No. 89-1279). Petitioner argues that the punitive award of \$1,000,000 is excessive in light of a \$3,923.24 actual damages award.

35. The compensatory damages awarded were \$305,000. The punitive damages awarded were \$1 million.

regarding punitive damages because "there has been no legislative change in the Texas rules governing imposition of and computation of punitive damages." Petition at 10. That is incorrect. In 1987, as part of the general reform of state tort law, Texas adopted specific statutory provisions regulating punitive damages. *See* § 41.001, et seq., Tex. Civ. Prac. & Rem. Code Ann. (Vernon Supp. 1990), parts of which are reprinted in Appendix C at 6a. Under the new Texas statute, a punitive damage award may not exceed \$200,000, or 4 times the compensatory award, whichever is greater. Petitioner does not suggest that there is any constitutional defect in the present Texas statutory scheme. Although the Texas law did not literally apply to the instant case, because it was tried prior to 1987, the punitive award falls within the limits now set by Texas law.

In short, no issue concerning the jury instructions on gross negligence or punitive damages has been properly raised by the petitioner in this case. This is the only issue under review in *Haslip* which is common to this case. Consequently, this case should not be held pending disposition of *Haslip* and the issue is not worthy of plenary consideration.

(2) The second and third questions raised by the petition concern an appellate ruling, rather than trial court jury instructions. The jury was instructed that it could award punitive damages if it concluded that petitioner had been "grossly negligent." Petitioner does not challenge the jury verdict as such, but questions only the legal theory under which that verdict was upheld by the Texas Supreme Court.

Petitioner grounds its constitutional arguments on an assertion that, in sustaining the jury verdict, the Texas Supreme Court made a drastic, sudden, and totally unforeseeable change in state law. Insofar as this was a change in the law that prevailed at the time of the tort in 1976, petitioner argues, it violated the Ex Post Facto Clause.³⁶ Insofar as this was an alteration of prevailing law at the time of trial in 1981, petitioner contends, it violated procedural due process. Neither of these constitutional questions is presented in this case, however, because the suggested transformation in Texas law alleged by petitioner simply did not occur.³⁷

The standard for an award of punitive damages in Texas remains today what it has always been—gross negligence. The substantive definition of gross negligence

36. Petitioner's argument ignores the consensus that ex post facto principles only have application in cases which are criminal or involve civil penalties which "were really criminal penalties for which civil form was a disguise." *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952). While some of this Court's earliest cases do not clearly limit the sweep of the ex post facto principle, "[d]uring the early years of the 20th century, the uncertainty over the scope of the ex post facto clauses which marked the early cases was replaced by a consensus in favor of the narrow view that only criminal punishment is prohibited by the ban." L. Tribe, *American Constitutional Law* 635 (2nd ed. 1988).

37. Neither the due process nor the ex post facto arguments petitioner makes to this Court were made to the Texas courts. Petitioner claims to have raised these questions in its Brief on Remand. Petition at 6, n.3. In that document, however, petitioner took the position that its constitutional rights were violated because the Texas Supreme Court had imposed on it a "new legal duty" to warn the consumer. In this Court, petitioner now claims for the first time that the Texas Supreme Court changed the definition of gross negligence. *These are not the same constitutional questions.* This Court should decline to consider questions which were not clearly presented to the courts below. See *Webb v. Webb*, 451 U.S. 493, 498-502 (1981) (Simple invocation of words "full faith and credit" did not properly raise federal Full Faith and Credit Clause issue.).

remains just as it was framed in the jury instruction given in this case—whether the plaintiff proved:

that entire want of care which would raise the belief that the act or omission complained of was a result of a *conscious indifference* to the rights or welfare of the person or persons to be affected by it.³⁸

Nothing in *Alm II* changed this standard. In fact, the Texas Supreme Court observed that “[g]ross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of conscious indifference to the right or welfare of the person or persons to be affected by it.” Pet. App. at A6 (citing *Burk Royalty*, 616 S.W.2d at 920).

Petitioner does not deny that “conscious indifference” remains the touchstone of a claim for punitive damages in Texas. Nor does petitioner present any constitutional attack on the sufficiency of the evidence on which the jury found conscious indifference. The Texas Supreme Court concluded that “the evidence shows conclusively that Alcoa was consciously indifferent about the possibility of bottle cap blow-off.” *Alm II*, Pet. App. at A6.

In the face of a pattern of blow-off injuries, petitioner certainly had good reason to understand that its action was tortious and that it was imperiling the safety of consumers. Petitioner not only made a deliberate decision not to warn consumers, but it also failed to warn the bottler—J.F.W.—of the increasing number of serious bottle cap related injuries. Petitioner’s argument that it had no warning that it could be deemed grossly negligent simply has no support in the record.

38. Question 11, Pet. App. at A79 (emphasis added).

Petitioner asserts that the theory on which liability was based was entirely different from "the standard under which the case was tried and appealed." Petition at 12. Petitioner insists that the decision of the Texas Supreme Court in this case departed from prior state decisions which had held that a claim of gross negligence must be assessed in light of "all the surrounding circumstances." Petition at 11, citing *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 921 Tex. 1981). The Texas Supreme Court opinion, however, did not purport to establish any other legal standard; indeed, the opinion below expressly cited and relied on *Burk Royalty*. Petitioner argues that it would have prevailed under a proper application of *Burk Royalty*, and that there must thus have been some unspoken change in the underlying state legal standard. However, a majority of the Texas Supreme Court concluded that its decision in this case was entirely consistent with *Burk Royalty*.

Seizing on the fact that *Burk Royalty* based the determination regarding punitive damages on "all of the surrounding circumstances," petitioner asserts that Alcoa's communications with Seven-Up should have barred, or weighed heavily against, punitive damages.³⁹ Petitioner

39. Petitioner asserts that the case was "tried to the jury" under a standard requiring an evaluation of "all the surrounding circumstances." Petition, 11, *see also, id.* at 12 ("the standard under which the case was tried."). That is incorrect; the jury instruction, to which petitioner did not object on this basis, did not contain the phrase "all of the surrounding circumstances." Petitioner asserts that the existence of this standard was "undisputed" in 1976, when the tort at issue occurred. Petition at 15. That too is incorrect. *Burk Royalty*, upon which petitioner relies and which established that standard, was not decided until 1981, shortly before this case was tried in August and September, 1981.

makes this argument even though it knew that Seven-Up itself issued no warnings to consumers. Under these circumstances, the Texas Supreme Court acted neither unreasonably or unforeseeably when it concluded that “the evidence shows conclusively that Alcoa was consciously indifferent about the possibility of bottle cap blow-off.” Pet. App. at A6. Petitioner’s constitutional claim is at bottom simply a fact-bound contention that the Texas Supreme Court incorrectly evaluated petitioner’s exculpatory evidence.

Petitioner does not challenge the constitutionality of the present Texas standard of gross negligence. Neither does petitioner challenge the constitutionality of the standard that prevailed under Texas law in 1981. Petitioner’s constitutional claim rests solely on its argument that the 1981 and 1990 standards, although not inherently defective, differ significantly. In reality, Texas law has not changed materially, if at all;⁴⁰ petitioner is simply aggrieved because it disagrees with the manner in which the Texas Supreme Court applied established legal principles to the facts of this case.

40. Even assuming petitioner is correct that the Texas Supreme Court changed the standard for determining gross negligence in 1990, no due process violation has been shown. The most that petitioner can claim is that it lost a potential defense—the defense that it discharged its duty to warn consumers because it claimed to have warned Seven-Up. However, no party has a vested right to a common law defense. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978). The lower courts which have addressed similar due process challenges have been sensitive to the “notion that tort law . . . belongs almost exclusively to the states,” and have upheld state court decisions altering state tort law. *In re Asbestos Litig.*, 829 F.2d 1233, 1243, 1244 (3rd Cir. 1987) (Elimination of “state of the art” asbestos defense did not offend due process.); *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164, 166 (6th Cir. 1983) (Retroactive application of comparative negligence statute did not violate due process.).

The constitutional principle which petitioner urges this Court to adopt is that any new state court decision regarding tort law, or the law in any other civil case, is presumptively a violation of the Due Process Clause. The doctrine proposed by petitioner, at least with regard to procedural due process, would extend to cases involving no punitive damages, and, with regard to the Ex Post Facto Clause, to any case in which the application of state law to a particular set of facts was reasonably debatable. Were this Court to adopt such a rule, it would raise constitutional issues regarding virtually every civil case in every state court in the nation. Every unsuccessful civil litigant with a colorable claim of a shift in state law would have a plausible basis for seeking review in this Court, and that invitation to further litigation would swell substantially the number of certiorari petitions filed each term. Neither this Court nor any lower court has ever contemplated adoption of such a constitutional doctrine, and the decision of the Texas courts in this case do not conflict with the decision of any state or federal court.

CONCLUSION

This case is based on an incident and serious injury which occurred fourteen years ago. The litigation has been on appeal for almost nine years. At the eleventh hour, petitioner asserts that this Court should hold the case for still another year, pending the decision in *Haslip*. Petitioner's argument based on *Haslip* was never presented to the trial court, the Texas Court of Appeals or the Texas Supreme Court. This case should be brought to a conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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James E. Alm

August 20, 1990

APPENDIX A

Testimony of Petitioner's Witnesses Concerning Warnings

Testimony of George Overturf, Alcoa's Manager of Closure Technology, corporate representative at trial and expert witness:

Q. Prior to June 3, 1976, Alcoa didn't require that anyone who operated under these patents put a warning on the product; is that correct?

A. That is correct.

Q. Prior to June 3, 1976, Alcoa didn't recommend a warning to anyone; is that correct?

A. That is correct.

S.F. 264.

* * *

Q. We already have gone over some of these details, but Alcoa didn't require or recommend a warning be placed on products using this closure?

A. No, sir.

S.F. 298.

* * *

Q. Are you saying that Alcoa does not require or insist that a warnings be placed on this cap or on this bottle?

A. We do not. No.

S.F. 458-59.

* * *

Testimony of Jaye Gibbs, former Alcoa employee and expert witness at trial:

Q. Prior to the time of this occurrence, did Alcoa recommend to bottlers that they place a warning either

on the cap or on the bottle concerning this hazard, this danger to the public?

A. Not that I am aware of.

Q. Never told them they ought to do that?

A. Not that I am aware of.

Q. Did they make any such recommendation to manufacturers of bottles that they knew would be used with the Alcoa aluminum cap?

A. I don't believe so.

S.F. 840-41.

* * *

Q. I suppose when you give warnings, Mr. Gibbs, whether they are printed on the bottle or on the cap or they are put out in the newspaper or over the TV or however they are put out, that has the potential also of reducing the sales of the product, doesn't it?

A. It has that potential, I suppose.

Q. Yes. Because people sometimes get a little scared if they read about a product that might have some danger or some hazard?

A. Yes, they could.

S.F. 841.

* * *

Q. Yes, sir. I know you don't like to respond, but what I am trying to find out is at what point the problem becomes severe enough that Alcoa gets concerned enough to let the public know about it?

A. And I said I don't really know.

S.F. 848.

* * *

Q. I see. Considering this danger and hazard to consumers of soft drink bottles, soft drinks with this type of cap, this pilfer-proof aluminum cap, Mr. Gibbs, did Alcoa come up with any type of warning to warn people like Mr. Alm about this problem?

A. No, they didn't.

S.F. 955.

APPENDIX B

**Petitioner's Objections to the Gross
Negligence and Punitive
Damages Questions**

No. 1,101,479

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80th JUDICIAL DISTRICT

JAMES E. ALM

v.

OWENS-ILLINOIS, INC., ET AL

OBJECTIONS TO THE COURT'S CHARGE

To The Honorable Judge of Said Court:

NOW COMES, ALUMINUM COMPANY OF AMERICA (hereinafter "Alcoa"), and makes its objections to the Court's Charge at the conclusion of all the evidence and prior to submission of this case to the jury, and recites the basis of its objections as follows:

. . . .

X. Questions Nos. 12 and 13.

1. There are no pleadings to support the submission of these issues.

2. There is no evidence, or in the alternative, the evidence is legally insufficient, or in the alternative, it is against the great weight and preponderance of the evidence to support the submission of these issues.

3. Question No. 12 contains, and Question No. 13 relies upon, an incorrect definition of "grossly negligent" under the standards set out in the *Burk Royalty* case, which describes the test as conscious indifference "to the right or welfare of the person or persons to be affected by it."

WHEREFORE, PREMISES CONSIDERED, Alcoa submits these objections to the Court's Charge and prays that its objections be sustained and that the charge be revised in accordance with these objections and in accordance with the issues submitted in substantially correct form and filed with the Clerk of the Court, and for such other relief to which it may be justly entitled.

Respectfully submitted,

BUTLER, BINION, RICE,
COOK & KNAPP

By: /s/ MICHAEL CONNELLY

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Attorneys for Defendant
Aluminum Company of America

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Objections to the Court's Charge has been hand delivered to all counsel of record on this the 17th day of September, 1981.

/s/ MICHAEL CONNELLY
Michael Connelly

APPENDIX C**Sections 41.001 and 41.007, Texas Civil
Practice and Remedies Code
(Vernon Supp. 1990)****§ 41.001 Definitions**

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) "Defendant" means a party, including a counter-defendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

(3) "Exemplary damages" means any damages awarded as an example to others, as a penalty, or by way of punishment. "Exemplary damages" includes punitive damages.

(4) "Fraud" means fraud other than constructive fraud.

(5) "Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.

(6) "Malice" means:

(A) conduct that is specifically intended by the defendant to cause substantial injury to the claimant; or

(B) an act that is carried out by the defendant with a flagrant disregard for the rights of others and with actual awareness on the part of the defendant that the act will, in reasonable probability, result in human death, great bodily harm, or property damage.

Added by Acts 1987, 70th Leg., 1st C.S., ch.2, § 2.12, eff. Sept. 2, 1987.

§ 41.007. *Limitation on Amount of Recovery*

Except as provided by Section 41.008, exemplary damages awarded against a defendant may not exceed four times the amount of actual damages of \$200,000, whichever is greater.

Added by Acts 1987, 70th Leg., 1st C.S., ch.2, § 2.12, eff. Sept. 2, 1987.

No. 90-52⁽³⁾

Supreme Court, U.S.

FILED

SEP 11 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ALUMINUM COMPANY OF AMERICA,

Petitioner,

v.

JAMES E. ALM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

**PETITIONER'S REPLY TO THE
BRIEF IN OPPOSITION**

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Aluminum Company of America

Pittsburgh, Pennsylvania

September 10, 1990

BATEMAN & SLADE, INC.

BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

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REPLY TO BRIEF IN OPPOSITION

1. The first question presented by Alcoa's petition is whether an award of punitive damages imposed by a jury without any meaningful standards comports with the Due Process Clause. Respondent Alm expressly concedes that this same issue is now before this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279. Respondent's Brief ("Resp.Br.") 17 ("This is the only issue under review in *Haslip* which is common to this case."). Alm does not deny that this issue is worthy of the Court's plenary attention. Nor does he deny that this case is in several respects superior to *Pacific Mutual* for addressing that issue.¹

The only basis respondent offers for this Court to deny certiorari in this case is that this due process issue was supposedly not raised below. Resp.Br. 13, 15, 22. Curiously, respondent fails to couple this assertion with any attempt to refute Alcoa's recitation, already provided in the petition, of the procedural history documenting the manner in which this due process objection to the imposition of punitive damages was properly and timely raised in the Texas Court of Appeals. See Pet. 6 n.3. To be sure, respondent argues that Alcoa did not voice this constitutional objection during the formulation of the jury instructions, Resp.Br. 14-15, and respondent might be understood to be arguing thereby that Alcoa's constitutional claim, by analogy to a routine objection that the jury instructions somehow misstated Texas tort law, was waived if not

¹ Respondent contests only one of the grounds for this superiority set forth in the Petition for Certiorari. See Pet. 10. Alm argues that this case is no better than *Pacific Mutual* because Texas law on awards of punitive damages, like the Alabama tort law at issue in *Pacific Mutual*, has changed since the time of trial. Resp.Br. 16-17. Respondent is confused. The new Texas statute imposing a ceiling on punitive damage awards is irrelevant to the issues raised in Alcoa's petition, because Alcoa complains not of the *excessiveness* of the award or of a lack of proportion with respect to the compensatory award (issues that are raised in *Pacific Mutual*), but of the *lack of standards* for affixing punitive liability. In this respect Texas juries have no more guidance now than they did before — only a maximum dollar limit.

made *at trial*. But Alcoa does not allege the kind of “‘defect, omission, or fault in pleading’” that the Texas Rules of Civil Procedure address. Resp.Br. 14 (quoting Texas Rules). The objection here is that the lack of standards *anywhere in Texas law* for imposing punitive liability leaves a major structural gap in state law that violates the Federal Constitution — not the sort of defect that a state trial judge can fix by tinkering with a jury charge. Alm points to nothing in Texas law that purports to require that an objection to a constitutionally intolerable lack of standards, for which the legislature is primarily to blame, is waived if not made to a trial judge incapable of curing the problem.

In any event, respondent’s unsupported waiver argument has been conclusively trumped by the procedural rulings of the Texas Supreme Court in this case. As we have already pointed out without rebuttal, Pet. 6, the Texas Supreme Court directed the Court of Appeals on remand in 1986 to consider *any* argument Alcoa might choose to raise about punitive damages. In accord with that jurisdictional directive, Alcoa expressly invoked this Court’s then-recent dicta about the due process implications of unguided awards of punitive damages in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), and this Court’s notation of probable jurisdiction in *Bankers Life and Casualty Co. v. Crenshaw*, 107 S.Ct. 1367 (1987), (No. 85-1765). See Pet. 6 n.3. That is more than sufficient to preserve the argument, particularly since the trial of this case occurred in 1981, whereas the first hint of a due process objection to punitive damage awards came half a decade later in *Aetna* in 1986.²

² Even if Alcoa had failed to raise this new due process argument below, it would still be entitled to invoke it here, for “where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise a claim in accordance with the applicable state procedures.” *Reed v. Ross*, 468 U.S. 1, 16 (1983). See also *Murray v. Carrier*, 106 S.Ct. 2639, 2646 (1986). This Court’s recently established limits on announcing or retrospectively applying “new rules” on collateral review of criminal convictions that have already become final pose no barrier to the relief Alcoa seeks, since this case is here on direct review. Cf. *Saffle v. Parks*, 110 S.Ct. 1257, 1259-60 (1990); *Butler v. McKellar*, 110 S.Ct. 1212, 1216 (1990).

Thus, Alm's *only* argument against granting a writ of certiorari on the first question presented in the petition, or at least holding this case pending resolution of *Pacific Mutual*, collapses.³

2. Alm's only proffered reason for denying the writ on the second question presented is that "the Texas Supreme Court [has not] made a drastic, sudden, and totally unforeseeable change in state law." Resp.Br. 18. Respondent misses the point. Alcoa's argument is not that the courts of Texas are somehow barred from gradually changing or adapting state tort law, but that the state supreme court may not *affirm a punitive judgment on appeal* by applying a standard or theory of liability different from that on which the case was tried.⁴ That is the question presented here, although respondent has chosen not to discuss it.

Evidently, Alm has no quarrel either with the due process principles expounded in *Cole v. Arkansas*, 333 U.S. 196

³ Elsewhere in his brief, Resp.Br. 18 n.37, Alm does contend that the second and third questions presented were not raised in the courts below. In this regard respondent inexplicably takes issue with footnote 3 on page 6 of Alcoa's petition. Respondent is correct that *these* two questions were not raised below, but that is no surprise, since these constitutional violations of Alcoa's rights under *Cole v. Arkansas*, 333 U.S. 196 (1948), and under the *ex post facto* principle of the Due Process Clause, *did not even occur until the Texas Supreme Court handed down the decision that Alcoa asks this Court to review*. Respondent again seems confused. The point of footnote 3 of Alcoa's petition was that the *first* question presented, based on other due process principles, was properly raised below — a procedural fact that Alm cannot dispute.

⁴ Respondent seems to have confused this issue with the third question presented, since he conflates these distinct due process issues in his brief. See Resp.Br. 17 *et seq.* Consequently, all the cases relied upon by Alm in footnote 40, page 21 of his brief are inapposite, since they involved not the question presented here, but the quite different issue of general state power to modify common law defenses and other tort rules. In those of Alm's cases that actually involved a trial on the merits, the standard of defendant's liability applied on appeal was identical to that applied at trial, which distinguishes them from this case. See *In re Asbestos Litigation*, 829 F.2d 1233, 1236, 1244 (3d Cir. 1987); *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164, 165, 166 (6th Cir. 1983).

(1948), and its progeny, or with the application of those principles to this case. *If* a different standard or theory of punitive liability was indeed applied by the Texas Supreme Court on appeal, then respondent apparently concedes the existence of a constitutional issue that warrants the plenary attention of this Court. And, despite Alm's protests, there can be no doubt that the Texas Supreme Court in fact shifted to and applied a different theory of liability to affirm the award of punitive damages. The procedural history in the courts below, which respondent glosses over, speaks for itself:

*It is undisputed that the trial court considered "all the circumstances" in reviewing the jury's finding of gross negligence and held that finding to be "against the great weight and overwhelming preponderance of the evidence." Pet. 5. (A81).⁵

*It is undisputed that the Court of Appeals likewise evaluated the finding of punitive liability by "weigh[ing] all the evidence, both in support of and contrary to the challenged finding" (A22), and threw the verdict out because it was "so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." (A22-23). Pet. 6.

*Finally, it is indisputable that the Texas Supreme Court, bound by that court of appeals determination under the Texas Constitution,⁶ chose to disregard Alcoa's warnings to the

⁵Despite this undeniable procedural event, Alm insists that this case was not in fact tried under the "all the circumstances" standard because the jury charge did not contain that precise "phrase." Resp.Br. 20 n.39. But jury instructions are not mystical incantations that must never vary in form. What respondent overlooks are the facts (1) that the court's jury instructions defining the "preponderance of the evidence" made plain that *all* credible evidence was to be considered, and (2) that Jury Question 11 defined gross negligence as an "entire want of care" (A79) — a standard long deemed synonymous with an evaluation of "all the surrounding circumstances." See *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 916, 917, 919, 920 (Tex. 1981) (citing cases); Pet. 2-3.

⁶Respondent's oblique rejoinder notwithstanding, Resp.Br. 11 n. 23, the Texas Constitution could not be clearer on this issue. The Texas Supreme Court has held, without dissent on the matter, that "[c]ourts of appeals have conclusive jurisdiction of fact questions on appeal under Tex.Const. art.V.,

Seven-Up Company and other bottlers, decided to examine only plaintiff's evidence, and thereupon ruled that Alcoa had been grossly negligent *as a matter of law*.

Indeed, the Texas Supreme Court took these steps at the behest of respondent Alm, who criticized the previously prevailing "entire want of care" standard and vigorously urged the state's highest court to redefine gross negligence so as to disregard Alcoa's warnings to the soft drink industry. *See* Alm's Amended Application for a Writ of Error in the Texas Supreme Court at 21-27. Since respondent has previously admitted that he petitioned the Texas Supreme Court to "change[] Texas gross negligence law," Alm's Answer to Motion for Rehearing in the Texas Supreme Court at 22, fervent denials that such a change indeed took place do not sit very well in respondent's mouth. *See also id.* ("It is true that plaintiff had requested that the Court extend *Burk Royalty*.").

Petitioner is aggrieved not, as respondent supposes, Resp.Br. 21, by the Texas Supreme Court's mere application of state law to the facts in this case, but by its affirmance of punitive liability on appeal under a theory demonstrably different from that which was applied at trial. The conclusion that a different standard was in fact applied is inescapable. Since

§6." *Herbert v. Herbert*, 754 S.W.2d 141, 143 (Tex. 1988). It is universally recognized that this amendment to the state constitution "was designed to remove fact jurisdiction from the supreme court and place it in the newly created courts of (civil) appeals." *Id.* The Texas Supreme Court is empowered to reverse a court of appeal's ruling on the facts only if the lower court "utilizes an incorrect test in reviewing factual insufficiency," *id.* at 144, by, for example, substituting its own appraisal of the facts rather than merely determining whether the verdict is contrary to "the great weight of the evidence," *id.* (original emphasis). This is what happened in the case on which respondent mistakenly relies. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989), *cited in* Resp.Br. 11 n.23. The Texas Supreme Court there remanded to the court of appeals and directed application of the correct standard — which is the same standard properly applied by the court of appeals in this case: whether the jury's finding was "against the great weight and preponderance of the evidence." *Sterner*, 767 S.W.2d at 691. In *Sterner* the court of appeals had erred because it "considered only that evidence and the reasonable inferences therefrom tending to support the jury's 'finding,' and disregarded all contrary evidence This review, alone, cannot be the basis for establishing an issue as a matter of law." *Id.* at 690.

the Texas Supreme Court is required by the state's own constitution to defer to the court of appeal's review of the *facts*, the high court's only possible avenue for reversing the lower court was to insist upon a different standard of *law*: the Texas Supreme Court could reinstate the jury's punitive judgment *only* by applying a standard of liability that, unlike the court of appeal's standard, did *not* take all circumstances into account and that looked almost exclusively to the plaintiff's case.

Indeed, even under respondent's theory of the Texas Constitution, the Texas Supreme Court may reverse a factual determination of the court of appeals and reinstate a jury award only if that award is "supported by *all* of the evidence." Resp.Br. 11 n.23 (emphasis added). Obviously, since the court of appeals had conclusively ruled that the imposition of punitive damages against Alcoa was contrary to the "great weight and preponderance of the evidence," Texas' highest court could hold that the jury's damage award was supported by "all" the evidence *only* if it shifted to a different theory of punitive liability, one that did not require consideration of all the circumstances and that therefore summarily disregarded the core of defendant's case — the warnings to Seven-Up and other soft drink companies. Respondent protests, but fails to explain how any other conclusion is logically possible.⁷

In *Cole v. Arkansas*, this Court granted a writ of certiorari to a state supreme court and unanimously reversed a judgment

⁷ Respondent can find no comfort in the assertion that the Texas Supreme Court itself purported to be applying the same "all the circumstances" standard of liability, and did not *formally announce* that it was applying a different standard on appeal. See Resp.Br. 20. For whether court-ordered punishment has been affirmed on appeal on a theory different from that used to impose it at trial is necessarily a *federal* question to be decided by this Court in the course of its due process analysis, as it was in *Cole v. Arkansas* and its progeny. Alm's argument that this makes a federal case of "any new state court decision regarding tort law," Resp.Br. 22, obviously proves far too much, since it would apply to the unanimous decision in *Cole* as well as the more contemporary decisions in which *Cole* has been reaffirmed by this Court. See Pet. 13-14. There is nothing preposterous or dangerous in the well established principle that punishment may not be affirmed on appeal on a basis different from that on which it was initially imposed at trial.

imposing punishment because "petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." 333 U.S. at 202. The same action is called for here.

3. The third question presented by Alcoa's petition is whether the *ex post facto* principle of the Fourteenth Amendment's Due Process Clause prevents a state supreme court, in the course of policing discretionary jury awards of punitive damages, from lowering the threshold for imposing punitive damages and applying this new standard retroactively to acts that were governed, at the time they took place, by a standard more generous to defendants. Respondent Alm strains to rebut what this Court has *already* recognized: that retrospective imposition of punitive damages under a new standard of liability is an "important issue[] which, in an appropriate setting, must be resolved." *Aetna v. Lavoie*, 475 U.S. at 828. *See* Pet. 21.

Respondent voices no significant disagreement with petitioner's substantive argument on *ex post facto* principles and once again offers only the contention that there has in fact been no real change in the standard for evaluating gross negligence and imposing punitive liability.⁸ That position crumbles in the face of a fact that no member of the Texas Supreme Court has denied: *finding a defendant grossly negligent and imposing punitive damages as a matter of law is wholly unprecedented*. (A7-8, A12). In a dramatic departure from the law that governed Alcoa's conduct at the time in question — the "all the surrounding circumstances" standard that Alm concedes to have been the governing theory of liability, Resp.Br. 20 — the court below, at Alm's request, simply disregarded

⁸ Contrary to respondent's misapprehension, Resp.Br. 18, the *Ex Post Facto* Clause itself is not implicated in this case since that clause, of course, directly applies to legislative rather than judicial decrees. In any event, Alm's grasp of *ex post facto* principles, *see* Resp.Br. 18 n.36, is roughly 40 years out of date, since Alm ignores this Court's decisions in *Bowie v. City of Columbia*, 378 U.S. 347 (1964), *Marks v. United States*, 430 U.S. 188 (1977), and, most recently, *Collins v. Youngblood*, 58 U.S.L.W. 4855, 4858 (U.S. June 21, 1990) (citing L. Tribe, *American Constitutional Law* 638 (2d ed. 1988)).

Alcoa's detailed warnings to Seven-Up and held that the jury could not, as a matter of law, disbelieve the plaintiff's case.⁹

Alcoa's claim is not, as Alm suggests, Resp.Br. 20, some sort of evidentiary argument that Alcoa's warnings to soft drink companies absolutely, necessarily, or even presumptively preclude a verdict of gross negligence. Rather, Alcoa contends only that such warnings and other "surrounding circumstances" may not be summarily disregarded *ex post facto* by an appellate court when the law deemed them relevant to the issue of gross negligence at the time of the conduct in question. A remand for a new trial on punitive liability — which the court of appeals had ordered — is all that is at stake here and all that Alcoa seeks.

At that new trial, the jury can properly evaluate the evidence and theories of liability that Alm and the Texas Supreme Court now embrace, which differ dramatically from those that were pressed at trial. For example, Alm reveals great enthusiasm in his latest brief for the theory that Alcoa was grossly negligent because it could have required J.F.W., the bottler, to put a warning label on the Seven-Up bottle by making the placement of such a label a condition for obtaining a license to use Alcoa's capping machine. Resp.Br. 6-7 & n.12, 12 n.25. Yet it is undisputed that, as the court of appeals noted, Alm *previously* "appear[ed] to agree that . . . neither Alcoa, J.F.W., or anyone else, other than Seven-Up, could control what appeared on the bottles." (A26). Indeed, before the Texas Supreme Court

⁹While refusing to specify what standard of liability he thinks governed Alcoa's conduct in 1976 when the acts at issue took place (as opposed to the standard he believes was applied at trial), Alm states that the standard *could not* have been the "all the circumstances" test because that did not become law until *Burk Royalty* was decided in 1981. Resp.Br. 20 n.39, citing Pet. 11. Respondent is obviously mistaken. The passage from *Burk Royalty* quoted in Alcoa's petition at 11, to which Alm refers, itself quoted and described a 1975 decision employing the same standard. See *Burk Royalty*, 616 S.W.2d at 921 (describing *Atlas Chemical Industries, Inc. v. Anderson*, 524 S.W.2d 681 (Tex. 1975)). In *reaffirming* that punitive damages may be imposed only upon a finding of "an entire want of care, looking to all of the surrounding facts and circumstances, not just individual elements or facts," *id.* at 919, *Burk Royalty* relied on cases decided as early as 1952. *Id.*

shifted to a different theory of liability, "Alm argued that Seven-Up controlled warning labels, and Alm vigorously argued to [the court of appeals] that Alcoa could not satisfy its duty to warn Alm by warning J.F.W., *because Alcoa had a duty to warn Seven-Up.*" (A30) (original emphasis).

Given Alm's own previous position, it is disingenuous, to say the least, for Alm now to argue that Alcoa was not prejudiced when the Texas Supreme Court, at Alm's urging, changed the rules in mid-appeal, summarily disregarded Alcoa's warnings to Seven-Up, and imposed punitive damages as a matter of law. Neither the Texas Supreme Court nor the respondent has ever disagreed with the court of appeal's conclusion that "the evidence on the issue of gross negligence was not well developed in light of the Supreme Court's new rule." (A26).

We are dealing here with punishment — punitive damages — *not* with a mere compensatory judgment. The court of appeals ruled that it would be "manifestly unjust" to sustain a punitive award without giving Alcoa a new trial (A26), and the decision of the majority below to affirm the award on a different theory of liability without a new trial bitterly divided the Texas Supreme Court. Rather than trying to refute the dissent's analysis (which the majority below likewise declined to address), respondent brushes it off as the characteristically "flamboyant" rhetoric of a single jurist. Resp.Br. 12 n.27. Even if such *ad hominem* arguments were appropriate, Alm overlooks two things: first, three other justices joined that dissent; second, and more importantly, the majority itself *never denied* that disregarding Alcoa's warnings to Seven-Up (among others) and imposing punitive damages as a matter of law, on the basis of plaintiff's proof alone, represented an unprecedented shift in the governing legal standard. The Due Process Clause accordingly requires that Alcoa be granted a new trial.

CONCLUSION

Whatever due process limits on jury awards of punitive damages this Court may deem mandatory in *Pacific Mutual v. Haslip* will mean little indeed if the state appellate courts charged with applying and policing those limits (once the states formulate their details) are free to rewrite the rules after the trial and after the fact — as the court below did here. This Court should therefore grant a writ of certiorari and set this case for argument, or at the very least hold this case for resolution pending a decision in *Pacific Mutual*.

Respectfully submitted,

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